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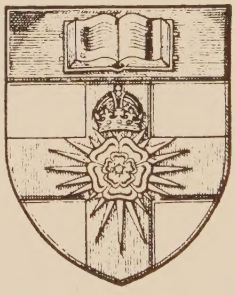

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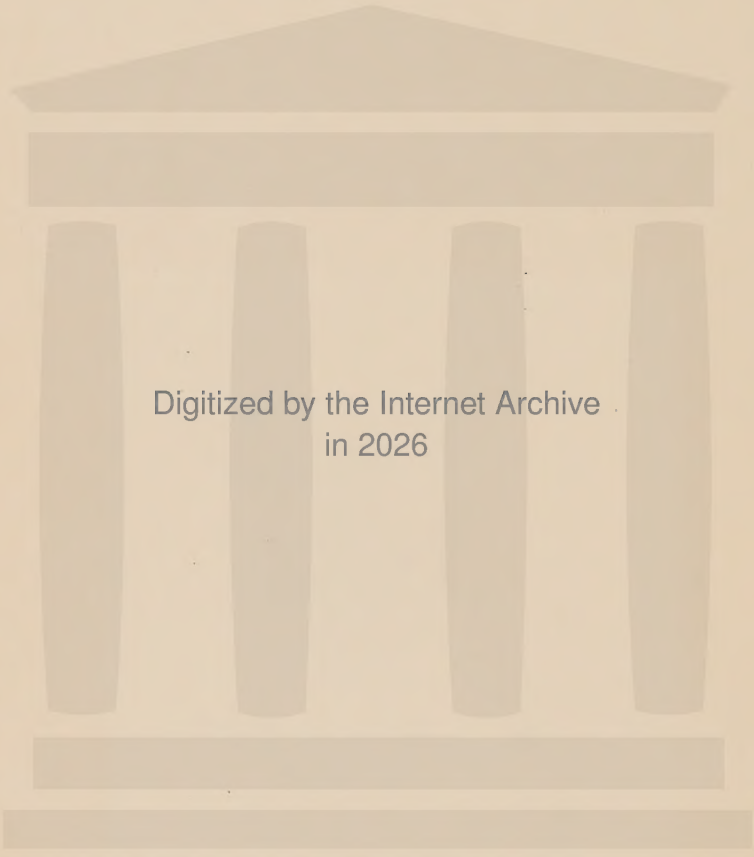

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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

In re LA SOCIÉTÉ LES AFFRÉTEURS RÉUNIS AND THE SHIPPING CONTROLLER.

1921
Feb. 28.

Arbitration—Claim against Shipping Controller—Discovery of Documents—Right of Controller to refuse—Jurisdiction of Umpire—Arbitration Act, 1889 (52 *&* 53 *Vict. c.* 49), *s.* 2; *First Sch., cl. f; Petitions of Right Act,* 1860 (23 *&* 24 *Vict. c.* 34), *s.* 7.

In an arbitration for the determination of disputes under a contract between the Shipping Controller on behalf of His Majesty and another party, the arbitrators or umpire have no jurisdiction under the Arbitration Act, 1889, First Schedule, clause *f*, incorporated in s. 2 of the Act, or otherwise, to require the Shipping Controller to make discovery of the documents in his possession or power relating to the matters in question.

Thomas v. *The Queen* (1874) L. R. 10 Q. B. 44; and observations of Rigby L.J. in *Attorney-General* v. *Newcastle-upon-Tyne Corporation* [1897] 2 Q. B. 384, 395 considered and applied.

Kain v. *Farrer* (1877) 37 L. T. 469, and *Penrice* v. *Williams* (1883) 23 Ch. D. 353 explained and distinguished.

In the Arbitration Act, 1889, First Schedule, clause *f*, incorporated

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in s. 2 of the Act, the words "subject to any legal objection" apply to all the subsequent provisions of the clause, including not only the provision that the parties shall produce before the arbitrators or umpire all books, etc., within their possession or power, but also the provision that the parties shall "do all other things which . . . the arbitrators or umpire may require."

CASE stated by an umpire.

By an agreement dated August 14, 1919, and made between the Shipping Controller on behalf of His Majesty, hereinafter called "the respondent," and La Société Les Affréteurs Réunis of France, hereinafter called "the claimants," pursuant to an arrangement between the British and French Governments for the transfer of certain British vessels to the French flag, it was provided (para. 1) that the respondent should sell to the claimants the steamer *War Anglian* for 215,000*l.*; (para. 3) that the respondent agreed to place the steamer in dry dock for inspection of parts under water; and that the respondent should repair all damage before delivery of the steamer, fair wear and tear excepted; (para. 4) that the steamer should be deemed to be ready for delivery on completion of the survey in dry dock and repair of damage (if any); (para. 11) that any dispute arising under the agreement should be referred to arbitration under the Arbitration Act, 1889; and (para. 15) that the steamer was at that time undergoing repairs and reconversion at Falmouth from an oil-carrying vessel to a cargo vessel, and on completion of these repairs and reconversion would be delivered to the claimants in accordance with clauses 3 and 4 of the agreement.

Disputes arose between the parties under the agreement the nature of which appeared from the points of claim and of defence delivered by the parties respectively in the arbitration. The claimants alleged that the respondent by his agent represented and warranted, and/or that it was a term of the contract that the steamer should be delivered to the claimants about September, 1919, and that alternatively it was an implied term that the repairs should be completed and the steamer delivered within a reasonable time, that the steamer was not ready for delivery and was not delivered in September, 1919, or within a reasonable time, that delivery was made

on March 10, 1920, and that at the latest the delivery should have been made by November 20, 1919; that the steamer was improperly kept by the respondent at Falmouth, which was an unsuitable place for repairs; that in consequence the steamer suffered damage and had to be dry-docked, that alternatively the damage was caused by the neglect or default of the respondent or his agent, and that the making good of this damage delayed the repairs and delivery to the claimants; that the repairs were not promoted with reasonable despatch, that the repairers did not obtain proper or sufficient repair appliances and plant or sufficient workmen, that the respondent did not provide them with any or proper plans and instructions for the repairs, that he failed to exercise sufficient supervision over the work, and that the respondent and the repairers did not procure the material required in the repairs in due or reasonable time; that the respondent failed to complete all necessary repairs or to hand over the steamer in proper condition; and that the claimants suffered damage to the extent of upwards of over 78,000*l.*

The respondent, on the other hand, said that the steamer was delivered on completion of the survey and the repair of the damage found when she was dry-docked, and that she was delivered in a reasonable time; that they admitted that the claimants only took delivery of the steamer on March 9, 1920, that the steamer was ready for delivery on March 4, but the claimants had not made arrangements for payment in accordance with the contract and in consequence delivery was delayed; and except as aforesaid he denied all the allegations of the claimants.

The parties desired that these disputes should be referred to arbitration under clause 11 of the said agreement. Solicitor for the claimants prepared and sent to the respondent's solicitor (the Treasury Solicitor) on behalf of the respondent a draft submission which contained a provision that "mutual discovery shall also be given." In the draft as returned by the Treasury Solicitor that provision was struck out, and there was substituted for it a provision that "The claimants shall within ten days from the delivery of points

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of defence give discovery of documents." The attempt to prepare a formal agreement of submission was eventually abandoned, and the parties went to arbitration without any formal submission apart from clause 11 of the agreement, and arbitrators and an umpire were duly appointed.

In the course of the preparation for the arbitration correspondence passed between the solicitors for the respective parties as to the discovery of documents to be given by the respondent. On July 22, 1920, the respondent's solicitor sent to the claimants' solicitors a list of documents including letters and other communications between the respondent and the claimants or their agents or solicitors. On September 6, 1920, the claimants' solicitors wrote: "With reference to your list of documents . . . . this is very defective. It does not contain any correspondence between the Ministry of Shipping and/or Messrs. Weir & Co. of London and/or Messrs. Cox & Co. of Falmouth" [the firms employed by the Ministry in the reconditioning and repair of the steamer] "and/or any letters or reports from Mr. Smart or Capt. Claridge who were surveyors for the Ministry. We should be obliged if you would obtain these and let us see them. Also we should like to see Messrs. Cox's books and time sheets and all other documents relating to work done on this ship . . . . and their correspondence with sub-contractors and others with reference to the work which was done, ... orders for materials, correspondence between Messrs. Cox and other firms relating to their work, also any plans, specifications, and instructions they had or received, and any other documents . . . . or writings, or books, or accounts not already disclosed relating to the matters in question." The claimants' solicitors again wrote several times requesting complete discovery, and the respondent's solicitor replied that the matter was being attended to. On November 2 the respondent's solicitor wrote: "I do not agree that the Ministry of Shipping has agreed to mutual discovery. The paragraph in the draft agreement which you inserted to provide for this was deleted by me. All that has been arranged is that the parties shall exchange lists of documents, and this has been

done. While the Ministry of Shipping is willing to disclose all documents in its possession relating to the matters in question which can be disclosed without detriment to the interests of the public service, I cannot agree that there is any power to compel the Department to give discovery. . . . ." On November 11, 1920, the respondent's solicitor voluntarily sent to the claimants' solicitors a second list of documents including copies of several letters which had passed between the Ministry of Shipping and Messrs. Weir & Co. or Messrs. Cox & Co., and between the said Ministry and the claimants' agents. In a letter of the same date the respondent's solicitor wrote: "It is regretted that some files have been lost, so that there are many documents in your list which I have not got. . . . . With reference to your letter of September 6 last, the letters in my second list of documents to or from Messrs. Weir & Co. and Cox & Co. are the only ones that can be found in any way material to this arbitration. With reference to reports from Mr. Smart or Capt. Claridge I am instructed that these gentlemen were in the service of the Ministry and any reports received from them were confidential and in the interest of the public service cannot be disclosed." On November 23, 1920, the claimants' solicitors wrote expressing regret that the Ministry of Shipping had given such very defective disclosure of documents.

The dispute which thus arose as to the respondent's discovery came before the arbitrators and umpire at a preliminary hearing, when an application was made on behalf of the claimants for an order against the respondent for further and better discovery.

It was contended on behalf of the claimants (*a*) that on the correspondence between the solicitors for the respective parties there was an agreement to give mutual discovery of documents, or a waiver of any rights the respondent might otherwise have had to resist such discovery, and that mutual discovery meant complete and not partial discovery; (*b*) that having regard to the contract of sale, the correspondence between the respective solicitors and their conduct, the arbitration tribunal had jurisdiction to decide whether the

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respondent had given proper or sufficient discovery, and to make an order for a further and better affidavit; and (*c*) that apart from the agreement or waiver alleged the arbitration tribunal had power to order the respondent to give discovery of documents in his possession or power relating to any of the matters in issue between the parties.

On behalf of the respondent it was contended: (*a*) that on the correspondence between the solicitors there was no agreement to give mutual discovery, and no waiver on behalf of the respondent of his right to refuse discovery; (*b*) that the respondent's solicitor on behalf of the respondent had not agreed to give the arbitration tribunal jurisdiction as to discovery or to make an order for discovery; and (*c*) that there was no power in the arbitration tribunal to make an order for discovery against the Shipping Controller.

The umpire, to whom the question had been left by the arbitrators, decided that he had no jurisdiction to make an order for discovery against the respondent, and he refused to make an order.

The question for the Court was whether the umpire had any discretionary power or jurisdiction to make any order against the respondent to give discovery or further discovery of documents.

C. Robertson Dunlop K.C. (*Viscount Erleigh* with him) for the claimants. The umpire had jurisdiction to order the respondent to give discovery of documents.

The Arbitration Act, 1889, First Schedule, clause (*f*), which is incorporated in s. 2 of the Act (1), provides that the

(1) Arbitration Act, 1889, s. 2: "A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the First Schedule to this Act, so far as they are applicable to the reference under the submission.

. . . . .

"THE FIRST SCHEDULE.

"Provisions to be implied in submissions.

. . . . .

"*f.* The parties to the reference and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrators or umpire on oath or affirmation, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire, all books, deeds, papers, accounts, writings, and documents within their possession or power respectively which may be

parties to the reference shall (inter alia) "produce before the arbitrators or umpire, all . . . . documents within their possession or power respectively which may be required or called for." The express power thus given to the arbitrators or umpire of requiring a party to produce documents implies an ancillary power of requiring a party to give discovery by affidavit of documents in order that it may be known what documents he should be required to produce: Russell on Arbitration, 10th ed., p. 370. Clause (*f*) further provides that the parties shall "do all other things which . . . . the arbitrators or umpire may require." This express power to the arbitrators or umpire of requiring a party to do all other things includes a power of requiring him to give discovery of documents. As to the condition mentioned near the beginning of clause (*f*) "subject to any legal objection," that applies to the earlier provisions of the clause but it does not apply to the last provision of the clause that the parties shall "do all other things which . . . . the arbitrators or umpire may require," and therefore it does not apply to the power included in that last provision of requiring a party to give discovery. That condition refers to a legal objection on one or other of the well-known grounds of privilege: see Annual Practice, 1921, p. 487, which may be taken to actual production or inspection of documents, but not to mere discovery by an affidavit of documents. Even if that condition be applicable to a case like this in which mere discovery is claimed, the respondent cannot here show any legal objection to making discovery.

Assuming that the respondent represents the Crown he could not take any legal objection to making discovery if required to do so by the umpire. The Crown itself could not successfully rely upon its prerogative of refusing to do what is prejudicial to the public interest as a legal objection to making discovery of documents, though it might no doubt afterwards rely upon that prerogative as an objection to production or inspection of the documents. It is true that

required or called for, and do all other things which during the proceedings on the reference the arbitrators or umpire may require."

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in *Thomas* v. *The Queen* (1) it was held in 1874 that in a petition of right the suppliant had no power to obtain discovery under the Petitions of Right Act, 1860, s. 7, and the Common Law Procedure Act, 1854, s. 50. The former of these sections however provides that the "laws and statutes in force" as to (inter alia) the means of procuring and taking evidence between subject and subject shall apply to petitions of right, and the Rules of the Supreme Court as to discovery in actions between subjects therefore now apply to petitions of right, and the Crown is bound to give discovery like any other litigant. *Thomas* v. *The Queen* (1) does not apply to this case, which is not a petition of right, but an arbitration. It would seem that the privilege of the Crown with regard to discovery rests rather on technical difficulties than on a distinct prerogative, and that a Government department may have an order for discovery made against it: see *Tomline* v. *The Queen.* (2) The reason why in arbitrations between the Crown and a subject the question has never before arisen as to the subject's right to discovery from the Crown is that in such cases the Crown has never refused discovery but has always agreed to mutual discovery. The respondent by voluntarily submitting to the arbitration has given up any right which he might have had as a Minister of State of relying on the prerogative of the Crown. He has vested in the arbitrators and umpire whatever jurisdiction there might be as to discovery of documents: *Penrice* v. *Williams* (3), and as the arbitration is under the Act of 1889 there was a wide jurisdiction in regard to the matter: see Russell on Arbitration, 10th ed., p. 370.

The respondent does not represent the Crown. He is appointed under the New Ministries and Secretaries Act, 1916 (6 & 7 Geo. 5, c. 68), as minister of shipping, and, although he is the head of a Department of State, when he becomes a party to legal proceedings he does not stand in the place of the Crown but of an ordinary litigant, and cannot avail himself of the prerogative of the Crown in regard to the

(1) L. R. 10 Q. B. 44. (2) (1879) 4 Ex. D. 252.
(3) 23 Ch. D. 353.

disclosure of documents, but is liable to have an order for discovery made against him : *Kain* v. *Farrer* (1) ; Robertson's Civil Proceedings by and against the Crown (1908), p. 598.

If the respondent had any right to refuse to give discovery, he waived that right by the letters and conduct generally of his solicitor acting on his behalf.

Sir Gordon Hewart A.-G. (*L. F. C. Darby* with him) for the respondent. The umpire had no power to require the respondent to give discovery of documents to the claimants.

On the true construction of clause (*f*) in the schedule to the Arbitration Act, 1889, incorporated in s. 2 of the Act, the words "subject to any legal objection" apply to all the subsequent provisions of the clause, including not only the provision that the parties shall produce documents, but also to the provision that they shall "do all other things which . . . . the arbitrators or umpire may require," under which it is alleged that the umpire has power to require a party to make an affidavit of documents. The respondent has a "legal objection" within the meaning of that clause to being required to make discovery of documents. Under the New Ministries and Secretaries Act, 1916, s. 5, the respondent was appointed minister of shipping to hold office during His Majesty's pleasure. That Act does not make the respondent an independent contractor liable to be sued as a private litigant and subject in all respects to the ordinary rules of procedure, but a minister of the Crown representing the Crown in one of its aspects. Moreover, the arbitration was entered into for the purpose of settling disputes under the agreement of August 14, 1919, which was expressly made between the respondent "on behalf of His Majesty the King" and the claimants. This case is distinguishable from *Kain* v. *Farrer* (1), in which the action was brought against the Secretary of the Board of Trade not as in any sense representing the Crown, but as representing a corporation with power to sue and be sued, the action being one which could now be brought against him under s. 460 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).

(1) 37 L. T. 469.

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The respondent is therefore entitled in the present proceedings to avail himself of the prerogative of the Crown. In a petition of right the Crown by virtue of its prerogative and in the public interest is entitled to refuse discovery of documents to an adverse litigant, and the Court has no power to order nor the litigant to require that the Crown shall make an affidavit of documents: *Thomas* v. *The Queen* (1); per Rigby L.J. in *Attorney-General* v. *Newcastle-upon-Tyne Corporation* (2); and see also *Tomline* v. *The Queen* (3); and the same principle must apply to other proceedings to which the Crown is a party. It is admitted on behalf of the claimants that in arbitration proceedings the arbitration tribunal has no power to require the Crown to produce documents, and it follows that it has no power to require the Crown to make discovery, for it is only where there is power to order production that there can be an ancillary power to order discovery: see Russell on Arbitration, 10th ed., p. 370. In *Penrice* v. *Williams* (4) it was no doubt held that the whole jurisdiction as to discovery was vested in the arbitrator; but that case is distinguishable, because there the order of reference expressly provided that the arbitrator should have that jurisdiction. The Crown by virtue of its prerogative would have a "legal objection" within the meaning of clause (*f*) to making an affidavit of documents, and the respondent as representing the Crown is entitled to take the same objection.

The respondent did not waive his right to resist discovery. It is plain from the alterations made by the respondent's solicitor in the draft agreement of reference that the respondent did not then consent to mutual discovery, and there is nothing in the subsequent correspondence to show that he ever changed his mind in that respect.

Dunlop K.C. in reply. There is no substantial distinction between *Kain* v. *Farrer* (5) and the present case. If the respondent in this case represents the Crown, the Secretary

(1) L. R. 10 Q. B. 44.
(2) [1897] 2 Q. B. 384, 395.
(3) 4 Ex. D. 252.
(4) 23 Ch. D. 353.
(5) 37 L. T. 469.

of the Board of Trade in that case equally represented the Crown. The observations of Rigby L.J. in *Attorney-General* v. *Newcastle-upon-Tyne Corporation* (1) upon which the respondent relies were mere obiter dicta unnecessary to the decision of that case, and they are not therefore of binding authority. Moreover, the Lord Justice did not say that the adverse litigant was not entitled to any discovery from the Crown, but only that he was not entitled to discovery of privileged documents. There is no general rule that the Crown can in no case be required to make discovery : see *Tomline* v. *The Queen.* (2) In a commercial arbitration to which the Crown is a party mutual discovery should be required.

DARLING J. In this case the Shipping Controller, who is called the respondent in these proceedings, acting on behalf of His Majesty the King, made an agreement in writing dated August 14, 1919, with La Société Les Affréteurs Réunis of Paris, who are called the claimants. Disputes arose between the respondent and the claimants under the agreement, and those disputes were submitted to arbitration, and have gone to an umpire. For the purposes of the arbitration the claimants wanted to obtain from the respondent discovery of certain documents. The respondent has voluntarily given to the claimants lists of certain documents which he admits are in his possession or power relating to this matter, but the claimants desire him to make discovery of many other documents. The fact that he has given these lists and admits that he has these documents does not preclude him from taking advantage, should it become necessary to do so, of the privilege which the Crown can always claim through its properly authorized officers, that although the documents exist and are material to the matter in dispute, yet it is against the public interest that they should be produced and put in evidence. It thus seems to me that this question is one of very small practical importance, though the case has been treated as if it were of a constitutional character and almost lifted to a position beside the well-known case of ship-money.

(1) [1897] 2 Q. B. 384, 395. (2) 4 Ex. D. 252.

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Suppose we should hold that the Shipping Controller is bound to make an affidavit stating what documents are in his possession or power relating to the matter in dispute and setting out a list of them, even then he would be able to refuse to produce them for reasons of public policy.

The question whether an order ought to be made directing the respondent to make an affidavit of documents has, however, been raised before the umpire, who, conceiving that he had no power to make the order, has referred the question to us and we must therefore decide it. It is contended for the claimants that by virtue of cl. (*f*) of the First Schedule to the Arbitration Act, 1889, which is incorporated in s. 2 of the Act, the umpire has the power to make the order. [His Lordship read cl. (*f*).] It is said that the provision in that clause that the parties shall "do all other things which during the proceedings on the reference the arbitrators or umpire may require"—that is all things other than producing books, and so on, which the arbitrators or umpire may require—gives the umpire here power to order the respondent to make an affidavit as to documents. It is however contended on behalf of the respondent that the clause only provides that the umpire may require these things to be done "subject to any legal objection." I do not think that those words "subject to any legal objection" are limited, as counsel for the claimants has argued, to an objection to the production of any particular document because of something in the character of that document. I think that they should be construed according to their plain literal meaning subject to any legal objection.

If that be so, then one must here consider whether it would be a legal objection to ordering the respondent to make discovery to show that the Crown, or the respondent as representing the Crown, has a prerogative by virtue of which it may require a litigant against the Crown to make discovery, while the litigant cannot require the Crown to do the same thing. I think that it would be a legal objection to be able to show that. We must therefore

inquire whether the Crown has a prerogative such as that. Counsel for the claimants places much reliance on the case of *Kain* v. *Farrer* (1) which was decided in 1877. I do not think that that case helps us very much in dealing with the present case. What happened there appears from the headnote to the report which is as follows: "In an action against the Secretary of the Board of Trade for acts done by the Board's servants, an order having been obtained for discovery of documents, the defendant made an affidavit stating that he had, as Secretary to the Board, certain official documents in his official custody and control, and that he objected to state anything further with respect to them on the ground of public policy. Held, that this was insufficient to establish the privilege claimed." The defendant in that case was not in exactly the same position as the respondent in this case. In that case an order for discovery had been made, and the defendant was taking the objection which a witness coming from a public office into the witness box, with an official document in his hand, may always take to its disclosure, if he is a proper person to do so. The effect of the decision in *Kain* v. *Farrer* (1) appears from what is there said by Grove J. (2): "The defendant, therefore, accepts the action in his official capacity, and says that the Board has, and that he has, as their secretary, the control and custody of divers documents. If he were to answer that he was the mere manual custodian of the documents, and could not, if he would, produce them, that might be a different thing. He goes on: 'I object, on the ground of public policy, to state anything further as to the documents in the possession or power of the Board of Trade.' That is, he objects to say anything further than that the documents in his power are official." Then he says (2): "It is simply a general statement that he objects to produce documents, on the ground of public policy." I gather from this judgment that where an order has been made for discovery against a party he may object to produce a document on the ground of public policy if he be the proper person to take the objection and if he takes it

(1) 37 L. T. 469. (2) 37 L. T. 470.

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at the proper time. It does not however cover the case with which we are here asked to deal. An authority somewhat more to the point is I think to be found in the case of *Tomline* v. *The Queen*. (1) There Mr. Bowen, arguing for the Crown, said: "The question is, whether in a petition of right the Crown is entitled to a discovery of documents as against the suppliant." It was held that the Crown was entitled to have discovery from the suppliant, but it was not held that the suppliant had the same right against the Crown. In the course of the argument Mr. Bowen said: "It has been decided by the Court of Queen's Bench in *Thomas* v. *Reg.* (2), that discovery cannot be obtained from the Crown." That case is a distinct authority that discovery cannot be obtained from the Crown. Then he goes on: "and the judges in the Exchequer Division were of opinion that the principle of that decision extended to cases where discovery is sought from a suppliant." In taking that view they were in fact wrong; but there is no authority for saying that they were wrong when they said that discovery cannot be obtained from the Crown. In *Tomline* v. *The Queen* (1) Bramwell L.J., in the course of his judgment, in which Baggallay and Thesiger L.JJ. concurred, said (3): "I repeat that it is unnecessary to express any opinion as to *Thomas* v. *Reg.* (2); but I may remark that if technical difficulties do exist in the way of obtaining discovery from the Crown, possibly the Legislature has intentionally left those difficulties in existence, in order that it may be in the discretion of the Crown whether it will afford the information sought for by a suppliant." I cannot see that this in any way trenches upon *Thomas* v. *The Queen* (2) as an authority for the proposition that discovery cannot be had against the Crown, and Bramwell L.J. indicates a reason why that case may very well be left where it is. Besides that case, however, there appears to be a distinct authority upon this matter in a passage in the judgment of Rigby L.J. in *Attorney-General* v. *Newcastle-upon-Tyne Corporation* (4), and counsel for the

(1) 4 Ex. D. 252.
(2) L. R. 10 Q. B. 44.
(3) 4 Ex. D. 256.
(4) [1897] 2 Q. B. 384.

claimants can only say with regard to that passage, that it was merely a dictum—I presume he meant an obiter dictum which was not necessary to the decision of the case. I rather think that that criticism is well founded. It would seem that the case could and indeed must have been decided as it was even though that passage had been omitted, because Lopes L.J. gave judgment to the same effect, and no such passage occurs in his judgment. But even if the statement of Rigby L.J. (1) was an obiter dictum, this Court is entitled to have regard to it and must look at it in order to see whether or not it lays down a principle which appears to be the right one. What he said was: "I have got to administer the law; the law is that the Crown is entitled to full discovery, and that the subject as against the Crown is not." (1) It was stated in *Tomline* v. *The Queen* (2) that the Crown does not owe discovery to the subject. I think Rigby L.J. was saying no more than that. There is thus a definite decision of the Court of Exchequer that the Crown is not bound to give discovery to the subject, and the opinion of a Lord Justice in the Court of Appeal recognizing that decision, and that decision and opinion are sufficient authority for this Court to recognize the rule which they lay down as the law of the land, unless it is convinced that it cannot be so. Rigby L.J. goes on: "That is a prerogative of the Crown, part of the law of England, and we must administer it as we find it. I may say that in these days the prerogative of the Crown is about equivalent to the rights of the public, and therefore there is nothing so very hard in it; but in this case, as we have heard, no attempt has been made to depart from the practice that to my knowledge has existed for many years past; and my experience goes a long way back, though my own tenure of office as a law officer was only a short one. Now I know that there has always been the utmost care to give to a defendant that discovery which the Crown would have been compelled to give if in the position of a subject, unless there be some plain overruling principle of public interest concerned which cannot be disregarded. Then there is no

(1) [1897] 2 Q. B. 384, 395. (2) 4 Ex. D. 252.

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hardship." It cannot therefore be disputed that were the fullest affidavit made and the fullest possible list of documents given, the Crown might even at the last say that having made that affidavit, and given that full list of the papers, it would still at the proper moment refuse to let the arbitration tribunal see them, on the ground that it was not in the interest of the Crown, which, as Rigby L.J. says, is equivalent to the interest of the public, that they should be shown to the umpire or to anybody else.

In this case the question is whether the Crown, although it may refuse to show the documents in the litigation, is bound by the law of England to make an affidavit stating what the documents are. It seems to me to be a great dispute about a little matter. An affidavit of documents when it has been obtained is not, like a thing of beauty, a joy for ever, but remains only an affidavit, and in this case, it seems to me, it would be one of the most empty affidavits it is possible to conceive. It would simply state that the respondent had in his possession or power certain documents but that he objected to produce them for the sufficient reason that they should not be produced in the interests of the public, as would be shown at the proper time. There is no authority for the proposition which has been advanced on behalf of the claimants that the Crown can be compelled to make an affidavit of documents. I think that the Attorney-General is right in saying that for the purposes of this case the Shipping Controller is practically the Crown. It is plain, I think, from the agreement into which he entered that he was acting on behalf of His Majesty the King, and therefore that the protection of the prerogative applies to him.

With regard to the other contention of the claimants, that the Shipping Controller has waived the objection to make discovery, I do not think that it has been made out. It is unnecessary to go through the whole of the correspondence. It is sufficient to look at the draft agreement of submission as sent by the claimants to the respondent and as afterwards altered by the respondent. The draft

had originally run thus: "The claimants shall within a reasonable time deliver short particulars of claim and the respondents shall deliver within a reasonable time short particulars of defence and mutual discovery shall also be given." Consider how it was changed by the respondent's solicitor. The words "and mutual discovery shall also be given" were struck out and for them were substituted the words "The claimants shall within ten days from the delivery of points of defence give discovery of documents," there being no reciprocal obligation as to discovery. It seems to me that that alteration in the submission was not only not a waiver, but that it was by implication a plain insistence by the respondent on his right to have discovery against the claimants, but to refuse discovery to the claimants.

I think, therefore, that we should answer this question by saying that the umpire was right in the conclusion at which he arrived.

AVORY J. I agree with my Lord in thinking that the learned umpire in this case was right in refusing to make an order for discovery against the respondent. I also agree with my Lord that in cl. (*f*) under s. 2 of the Arbitration Act, 1889, the words "subject to any legal objection" govern the concluding words of that rule, that the parties are to "do all other things which . . . . the arbitrators or umpire may require." The question, therefore, is whether there is in this case a legal objection on the part of the Crown to doing that which it is suggested the umpire may and ought to require it to do—namely, to making discovery of the documents in its possession. It appears to me that the cases which have been decided on petitions of right are analogous to the present case. Indeed, in the present case, the argument for the Crown is even stronger than it was in those cases, because by the Petitions of Right Act, 1860, s. 7, it is expressly provided that so far as the same may be applicable the laws and statutes in force as to pleading, trial, costs, amendment, the means of procuring and taking evidence

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and the practice and course of procedure of the Courts of law and equity respectively for the time being in reference to suits and personal actions shall, unless the Court in which the petition is presented otherwise order, be applicable and apply and extend to such petition of right. Under that Act it was contended as far back as 1874 in *Thomas* v. *The Queen* (1) that the suppliant in a petition of right was entitled to obtain discovery of documents from the Crown, and the Court, which was composed of Cockburn C.J., Lush and Quain JJ., held that the suppliant had no right to require discovery from the Crown. Unless that case has been overruled we are bound by it. It is not suggested that it has been overruled; the only comment that can be made upon it is that Bramwell L.J. in *Tomline* v. *The Queen* (2) said it was unnecessary to consider whether it was correctly decided or not. He assumed, however, that it was correctly decided, and he pointed out, in the passage which my Lord has read from his judgment, that if difficulties exist in the way of obtaining discovery from the Crown the Legislature may have intentionally left those difficulties in existence in order that it may be in the discretion of the Crown to determine whether or not they will afford the information sought for by a suppliant. It is impossible, I think, to say that *Thomas* v. *The Queen* (1) has been overruled, and it was assumed in the argument by counsel for the Crown on the authority of that decision that discovery cannot be obtained from the Crown. One or two other authorities have been referred to, about which I should like to say a word. *Kain* v. *Farrer* (3), upon which counsel for the claimants strongly relied, is not a case in which this question ever came before the Court. The question there was not whether an order for discovery could or ought to be made against the Crown, but whether in a case in which such an order had been made against the Secretary of the Board of Trade, the affidavit filed on behalf of the Board of Trade was a sufficient affidavit. In fact the order for discovery was

(1) L. R. 10 Q. B. 44. (2) 4 Ex. D. 252.
(3) 37 L. T. 469.

made at chambers, the objection seems never to have been taken that it ought not to have been made, and the only point with which the Court were dealing was whether the affidavit made by the Secretary to the Board of Trade was in the proper form. Lindley J., as he then was, there made some observations which, I think, illustrate what my Lord has already pointed out—namely, that an affidavit of documents, if made in a case of this kind, would probably be useless for any purpose for which the claimant required it. Lindley J. said (1): "It is a common practice in Chancery to tie up in a bundle certain documents, and then state that the objection is to the production of all the documents in the bundle; and then the question is, whether what is said about that bundle is or is not sufficient." According to that statement it would be quite sufficient for the respondent as representing the Crown in this case to say in his affidavit that he has a bundle of documents, but that he objects to produce them on the ground that they are privileged.

The principle of *Thomas* v. *The Queen* (2) was also affirmed in *Tobin* v. *The Queen*. (3) There the question was raised whether it was competent for the Crown without leave to plead and demur at the same time to a petition of right, and the argument was that although it was not competent at that time for a subject to plead and demur at the same time there was nothing in the Petitions of Right Act, 1860, which took away the prerogative right of the Crown to plead double, as it was called, that is to say, to plead and demur at the same time.

I have one other observation to make, which relates to the case of *Attorney-General* v. *Newcastle-upon-Tyne Corporation*. (4) I am not prepared to agree that the statement of Rigby L.J. in that case, relied upon here by the Attorney-General, was a mere obiter dictum. I find that Mr. Robson in the course of his argument there said that the appellants, the Newcastle-upon-Tyne Corporation, were at a disadvantage because, while discovery could not be compelled by them

(1) 37 L. T. 471.
(2) L. R. 10 Q. B. 44.
(3) (1863) 14 C. B. (N. S.) 505.
(4) [1897] 2 Q. B. 384.

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as subjects against the Crown, the Crown can always claim discovery against the subject. That was an admission made by the appellants in the argument, and Lopes L.J. refers to it at the commencement of his judgment where he says: "It was urged on behalf of the appellants that they had a grievance; for while on the one hand discovery could not be compelled from the Crown, on the other hand the subject was bound to discover." It therefore appears to me that the observations made by Rigby L.J. were in a sense necessary to the decision, because they related to a point which had been distinctly raised in the argument, and that they are conclusive on the point, that in such circumstances as those of the present case the subject is not entitled to obtain discovery against the Crown.

For these reasons I agree that the order of the umpire in this case was right.

GREER J. I agree. In my opinion we ought to answer the question put by the umpire by saying that he has no jurisdiction to order the Shipping Controller to make an affidavit of documents. It seems to me quite clear that if the claimants had sought relief in a court instead of by way of arbitration, their proper way of proceeding would have been by a petition of right against the Crown. If in such a proceeding an affidavit of documents could not be ordered as against the respondent, it is inconceivable that powers should have been given under the Arbitration Act to an arbitrator acting under the Act to make an order which the Court could not make if the proceedings had been by way of petition of right. I note that the agreement which contains the arbitration clause is made expressly between the claimants in this case and the Shipping Controller on behalf of His Majesty the King, that is to say, on the face of the document the Shipping Controller appears as an agent acting on behalf of the King and in the arbitration clause when he appears before the arbitrator he appears there not in his personal capacity but as an agent of the King, putting arguments to the arbitrator on behalf of the King. I agree that *Thomas* v.

The Queen (1), which came before the Court in 1874, decided that in the proceeding by way of petition of right the Crown could not at that time be ordered to make an affidavit of documents, and I think that that decision applies at the present time, notwithstanding that the right to an affidavit of documents in an action now depends upon the Judicature Acts and the rules thereunder and not upon the Common Law Procedure Act, 1854.

I want to add one word about *Kain* v. *Farrer* (2), upon which great reliance was placed by counsel for the claimants, in order to point out that that was not from any point of view a proceeding between the Crown and the subject. It was a proceeding between a party and the Secretary to the Board of Trade as representing the Board of Trade. It was not contended and could not have been contended that the liability of the Secretary or of the Board was a liability of the Crown. It was an action for the purpose of determining the liability of the Secretary of the Board for wrongful acts and trespasses committed by inspectors acting on behalf of the Board, and in no circumstances could a claim of that kind be made against the Crown. Therefore in that case, so far as the Court deals with discovery at all, it deals with the matter on the assumption that it is deciding a case between parties who are both subjects of the Crown, and not a case in which one of the parties is the Crown itself.

I want to say another word, and that is about the construction of clause (*f*) in the schedule to the Arbitration Act, not with a view to adding anything to my reasons for giving my decision in this case, but with the view to making it clear that I am not personally satisfied that the power to order discovery either by way of an affidavit of documents or by way of an affidavit in answer to interrogatories is one of the powers which is conferred upon an arbitrator by that clause. [His Lordship read the clause.] Some limitation must, of course, be put upon these words, and, without deciding it, I merely say that this decision so far as I am concerned

(1) L. R. 10 Q. B. 44. (2) 37 L. T. 469.

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must not be understood as implying that an order can be made as between the parties to an arbitration for an affidavit of documents.

DARLING J. There is one other matter that I desire to mention. My brother Avory has called my attention to it. Counsel for the claimants relied upon *Penrice* v. *Williams* (1), and as that case had considerable place in the argument he addressed to us, it would be only courteous to refer to it, although we think that it does not at all stand in the way of our decision. It is stated there: "The order of reference provided . . . . (para. 7), that the parties should produce before the arbitrator the pleadings in the action, and all books, deeds, papers and writings in their or either of their custody or power relating to the matters in difference." Chitty J. in giving judgment said (2): "The order relied upon is an arbitration order containing the following usual clauses" —and after reading the clauses including clause 7 he continued: "The effect of this order is that, for all practical purposes, the action, so far as the Court is concerned, has disappeared in every respect except one." That exception was with regard to costs. Then he goes on: "There is also a further objection taken by the defendants, that the parties having, as is shewn on the face of the order itself, themselves agreed to place the whole jurisdiction with reference to discovery in the hands of the arbitrator, it was open to the plaintiff to have made an application to the arbitrator, which he has not done. I am of opinion that this latter objection is also fatal." (3) The decision in *Penrice* v. *Williams* (1) thus depends entirely upon the terms of the order in that case, and nothing there said can in the least affect the opinion which we have pronounced in this case.

Solicitors for claimants: *Ince, Colt, Ince & Roscoe.*
Solicitor for respondent: *The Treasury Solicitor.*

(1) 23 Ch. D. 353. (2) 23 Ch. D. 355.
(3) Ibid. 356.

J. R.

GILES *v.* KRUYER.

1921
Feb. 26;
March 1.

[1919. G. 256.]

Execution—Equitable Execution—Appointment of Receiver—Notice to Debtor's Bank—Payment by Bank to Debtor—Claims by Receiver against Bank—Banker and Customer.

The plaintiff recovered judgment against the defendant, but as his costs remained unsatisfied he obtained an order dated March 26, 1919, for the appointment of receivers by way of equitable execution, and on April 17, 1919, a copy of that order was served on the bank in which the defendant had then a sum on deposit. The order was made in the absence of the bank, and no steps were taken by the plaintiff to make the order binding on the bank till after December 4, 1919, on which date the bank, having heard nothing further of the matter, paid to the defendant, their customer, the amount standing to her credit. Thereafter the plaintiff took out a summons for an order on the bank to pay to the receivers the amount standing to the defendant's credit on March 26, 1919, with interest:—

Held, dismissing the application, that the order appointing the receivers, made in the absence of the bank, did not create a charge on the moneys in the bank or affect the rights and duties of the bank, and that as the bank had properly paid the money to the defendant, its customer, it was not liable to pay the amount over again to the receivers.

In re Pollard [1902] W. N. 144 applied.

Mullarkey v. *Donohoe* (1885) 16 L. R. Ir. 365 distinguished.

SUMMONS adjourned into Court heard by Greer J.

The plaintiff, in the action brought by him against the defendant Clara Kruyer, took out a summons "for an order that the London Joint City and Midland Bank, Ld., may be ordered within four days from the date of the order to be made herein to pay to Charles Watson Brown, 33 Chancery Lane in the County of London, solicitor, and David Nimmo of 24 Great Marlborough Street in the county of London, solicitor, the receivers appointed in the action by order dated March 26, 1919, the sum of 500*l.* and interest thereon at bankers' deposit rate from March 26, 1919, to the date of payment, representing part of the sum of 2300*l.* formerly standing on deposit with the Oxford Circus branch of the London Joint City and Midland Bank Limited in the name of the above named defendant, and that the costs of and

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occasioned by this application be taxed and paid by the bank to the above named plaintiff."

On March 11, 1919, the plaintiff obtained judgment against the defendant for the return of two Cape diamonds and a diamond ring then valued at 3800*l.*, and costs, and in default of the return of the diamonds and diamond ring, payment of 3800*l.* and costs. These articles were eventually returned to, and accepted by, the plaintiff, but the costs of the judgment, amounting to about 500*l.*, remained unsatisfied. On March 26, 1919, an order appointing the receivers was made and, for the purposes of the case, it was taken that a copy of that order was served upon the respondent bank on April 7, 1919. On December 4, 1919, the bank, having heard nothing further of the order or of the insistence of the receivers to have the money paid to them, paid over to the defendant the whole of the money standing to her credit on deposit account. This summons was thereafter taken out.

C. A. Bennett for the plaintiff.

Rayner Goddard for the bank.

The arguments sufficiently appear from the judgment.

GREER J. [after stating the facts continued :] The question I have to decide is whether it is a good answer to this application for the bank to say that they had paid the amount to the defendant, their depositor, at a time when they were not bound by the order appointing the receivers, that their rights and duties are exactly the same as if no such order had been made, and therefore that their right to pay their depositor continued until an order should be made to which they were parties. In support of this contention reliance was mainly rested on *In re Potts* (1) and *Croshaw* v. *Lyndhurst Ship Co.* (2) Those cases, so far as the actual decision is concerned, merely show that in this case the plaintiff is not a secured creditor, that the order appointing the receivers, made as it was in the absence of the bank, did not create a charge on the moneys in their hands, but was a mere order in personam

(1) [1893] 1 Q. B. 648. (2) [1897] 2 Ch. 154.

affecting the rights and obligations of the plaintiff and defendant, and not affecting the rights and duties of the bank. The mere fact that the plaintiff is not a secured creditor does not, however, carry the bank the whole way. I am bound, moreover, not merely by the decision in *In re Potts* (1), but by the ratio decidendi of the Court in giving judgment, and I think that decision shows that the order appointing the receivers, made in the absence of the bank, in no way affects the rights or duties of the bank, and that the bank being, if I may so describe it, untouched by the order are entitled, after it is made, to do anything they could have done before it was made, unless indeed steps were taken to make the order binding upon them. The order appointing the receivers is an order inter partes, it is in no sense an order creating rights or duties in rem, and consequently the person in possession of the fund or the debt, as the case may be, is in nowise limited as regards his rights or duties in reference to the debt by the appointment of the receivers. It is quite true, as was pointed out by Mr. Bennett on behalf of the plaintiff, that the order operates as an injunction to restrain the defendant from receiving the money, but that is not decisive, because, as is pointed out in *In re Potts* (1), the bank are not restrained from paying the money to the defendant; there is no obligation imposed upon them at all; the position is one in which equitable execution has started, but has not gone far enough to affect the rights or duties of the bank. As pointed out by Lord Esher in that case the persons in possession of the fund, over which a receiver had been appointed in their absence, were under no obligation not to pay the fund to the person originally entitled. He said (2): "Does this order, then, create an equitable charge? Does it come within the proper definition of a charge? If it had charged the money in the hands of the executors, and had ordered them not to pay it to Potts, but to pay it to the receiver, although it might not create a common law charge, or a charge within the meaning of any of the statutes which create charges, it might still perhaps amount to an equitable

(1) [1893] 1 Q. B. 648. (2) [1893 [1 Q. B. 658.

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charge." It will be observed that Lord Esher lays stress upon there being nothing in the order which requires the executors, either expressly or impliedly, not to pay the money to Potts. He goes on: "But does it do so? Is it possible that in equity a man who has or will have money to pay to Potts can be bound to pay it to Taylor & Sons" (who were in the position of the plaintiff in this case), "that it should be charged in his hands so that he is obliged to pay it to Taylor & Sons, so that if he pays it otherwise he will be guilty of a contempt of Court, when he had no notice of the application for the order, and no opportunity of making any answer to it—was in no way a party to it? To my mind, it would be a wicked injustice if the order did in terms purport to bind the executors, and order them not to pay the money to any one but the receiver, when they had no opportunity of being heard in opposition to it. But it is said that after the order had been made behind the executors' backs, notice of it was served on them. Now if you do an act which is grossly unjust against a man, how can it bind him any the more if, after you have done it, you tell him that you have?" The judgment of Lindley L.J. is substantially to the same effect. There is also a judgment of Joyce J. in *In re Pollard* (1) to the effect that a holder of a fund over which an order for sequestration has been made in his absence, even if he has had notice, may pay the person originally entitled notwithstanding the sequestration order. That seems to me to be practically on all fours with the case that I am now considering.

In re A Debtor; Ex parte Peak Hill Goldfield (2) was cited by Mr. Bennett, who relied especially on a passage in the judgment of Fletcher Moulton L.J. That case raised a question with reference to mutual debts and credits and it decided that an essential change is effected by the appointment of a receiver; thenceforward there were no mutual credits between a petitioning creditor and a debtor, and, though the effect of an adjudication in bankruptcy would be to defeat the title of the receiver and give a title to the trustee,

(1) [1902] W. N. 144. (2) [1909] 1 K. B. 430.

that would not suffice to bring s. 38 of the Bankruptcy Act, 1883, into operation, and consequently the petitioning creditor was entitled to a receiving order. Fletcher Moulton L.J. said (1): "On that date"—that is, the date of the appointment of a receiver—"all moneys payable by the company in respect of the debenture stock were payable to the receiver of the judgment creditor and not to the debtor, and the debtor was not entitled to receive them or to give a discharge for them or to set them up by way of set-off in an action." The case does not say that the person who owed the debt to the debtor was bound to pay the receiver, nor does it say that he was in any way bound by the order appointing the receiver. All it means is, that, as against the debtor, the debtor was not entitled to give a discharge, that is to say, he would be breaking the order if he gave a discharge; it does not decide that that discharge would not be an effective discharge to the creditor paying the debtor. In my judgment, therefore, it does not support the view for which Mr. Bennett was contending.

One other authority I desire to call attention to. In Halsbury's Laws of England, vol. xxiv., p. 378, it is said: "Though a tenant who has not been served with an order directing payment of rent to a receiver is justified in continuing to pay rent to his landlord, yet if in fact he has notice of the appointment and consequently knows that the landlord is no longer entitled to receive the rent, he cannot resist payment over again to the receiver unless he can plead compulsion of law." For the first part of this proposition *Brown* v. *O'Connor* (2) and *Mullarkey* v. *Donohoe* (3) are cited. The last-mentioned case is an authority for the proposition on the facts of the case there stated. There is no authority for the proposition considered in relation to a receiver appointed by way of equitable execution. The receiver in *Mullarkey* v. *Donohoe* (3) was a receiver appointed at the instance of a mortgagee, and the position seems to me different in that case from the case where a receiver is appointed by way of

(1) [1909] 1 K. B. 436. (2) (1828) 2 Hog. 77.
(3) 16 L. R. Ir. 365.

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equitable execution, because a mortgagee is the legal owner of the property and it is only by sufferance that the mortgagor is entitled to continue in possession of, and to collect, the rents. It is clearly laid down in *Mullarkey* v. *Donohoe* (1) that, in the case of a mortgage, payment after notice of the appointment of a receiver would not be a good payment. That case, however, does not seem to be on all fours with the case I am considering, and, if it is an authority contrary to my view, it seems to me inconsistent with *In re Potts* (2) and is therefore not binding upon me. In addition to that, of course, it is an Irish decision, and consequently, although entitled to great weight, not binding upon me.

The result is that I must dismiss this application with costs. I am not at all aggrieved in finding that the law enables me to do this, because it would not, in my opinion, be consistent with justice that the plaintiff in the action, having had an opportunity from April till December to apply for an order directly affecting the bank, and having allowed the bank as it were to go to sleep and possibly forget all about the order that had been served upon them, should recover. In those circumstances it does not seem consistent with justice that the bank, having paid their customer, should be called upon to pay the money over again to the receivers.

Application dismissed.

Solicitors for plaintiff: *C. W. & S. E. Brown.*
Solicitor for bank: *Maurice Mosely.*

(1) 16 L. R. Ir. 365.

(2) [1893] 1 Q. B. 648.

J. S. H.

[IN THE COURT OF APPEAL.]

C. A.
1921
May 10.

ATTORNEY-GENERAL *v.* BROWN.

Customs—Importation of Goods—Power to prohibit Importation of "arms, ammunition, gunpowder, or any other goods"—Construction—Ejusdem generis—Prohibition of Pyrogallic Acid—Validity of Prohibition—Customs Consolidation Act, 1876 (39 & 40 *Vict. c.* 36), *s.* 43—*Prohibition of Import* (*No.* 32) *Proclamation*, 1919—*Indemnity Act*, 1920 (10 & 11 *Geo.* 5, *c.* 48), *s.* 4.

Appeal from the judgment of Sankey J. [1920] 1 K. B. 773 allowed on terms by consent.

APPEAL from the judgment of Sankey J. at the trial of an information on behalf of the Crown. (1)

The information claimed that six casks of pyrogallic acid, which had been imported into the United Kingdom by the defendant in August, 1919, and which had been seized by an officer of Customs and Excise as forfeited to the Crown, should be adjudged as forfeited to the Crown, on the ground that by the Prohibition of Import (No. 32) Proclamation, 1919 (dated June 25, 1919, and made under s. 43 of the Customs Consolidation Act, 1876), the importation into the United Kingdom of "chemicals of all descriptions" was prohibited except under licence, the pyrogallic acid being "chemicals" within the Proclamation.

Sect. 43 of the Customs Consolidation Act, 1876: "The importation of arms, ammunition, gunpowder, or any other goods may be prohibited by Proclamation or Order in Council."

Sankey J., whose judgment was pronounced on December 17, 1919, held that the words "any other goods" were restricted to goods of the same class as those previously specified, and that therefore the Proclamation prohibiting the importation of an article not of that class was illegal and invalid.

The Crown appealed, notice of appeal being served on January 1, 1920.

While the appeal was pending the Indemnity Act, 1920,

(1) [1920] 1 K. B. 773.

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was passed and came into operation on August 16, 1920, which provided in s. 4: "Any Proclamation or Order in Council issued or purporting to be issued under section 43 of the Customs Consolidation Act, 1876, during the war and before the fifteenth day of April, 1920, prohibiting or restricting the importation of any goods into the United Kingdom, and any licence granted in pursuance of any such Proclamation or Order shall be, and shall be deemed always to have been valid, but nothing in this section shall be construed as rendering valid the continuance in operation after the fifteenth day of April, 1920, of any such Proclamation or Order in Council."

Sir Gordon Hewart A.-G. (*Sir Ernest Pollock S.-G.* and *Giveen* with him) for the Crown said that upon s. 4 of the Indemnity Act, 1920, the appeal would be allowed by consent on terms as to costs and as to the appraised value of the goods.

R. A. Wright K.C. and *James Wylie* for the defendant.

THE COURT (Bankes, Warrington and Scrutton L.JJ.) allowed the appeal on terms by consent.

Appeal allowed by consent.

Solicitor for Crown: *Solicitor for Customs and Excise.*
Solicitors for defendant: *Stephenson, Harwood & Tatham*

W. F. B.

[IN THE COURT OF APPEAL.]

C. A.
1921
May 31.

ATTORNEY-GENERAL *v.* COMPANY OF PROPRIETORS OF SELBY BRIDGE.

Tolls—Exemption—Motor-car "employed" in Military Service—Private Car of Officer used under Authority—Car conveying "officers and soldiers"—Soldiers and Civilian employed on Government Work—Army Act, 1881 (44 & 45 *Vict. c.* 58), *s.* 143, *sub-s.* 1.

The exemption from payment of toll in passing along a road or over a bridge contained in s. 143 of the Army Act, 1881, in favour of carriages "employed" in the military service of the Crown when conveying officers and soldiers of the regular forces on duty extends to the private motor-car of an officer which he is authorized to use for journeys on duty at the public expense.

The exemption from payment of toll in passing along a road or over a bridge contained in that section in favour of carriages belonging to the Crown when conveying "officers and soldiers" of the regular forces on duty extends to a motor-car belonging to the Crown, which contains, besides a non-commissioned officer and soldiers of the regular forces, a civilian employed as clerk of the works in certain Government works who is authorized to be conveyed in the car for the purposes of the Crown, and has a works pass from the military authorities.

Decision of Rowlatt J. [1921] 1 K. B. 149 affirmed.

APPEAL by the defendants from a decision of Rowlatt J. (1) on a special case stated by the parties for the opinion of the Court.

The facts are fully stated in the report of the case in the Court below.

Sylvain Mayer K.C. (*Poyser K.C.* with him) for the appellants repeated the arguments used by him in the Court below.

Giveen (*Sir Gordon Hewart A.-G.* with him) for the Crown was not called upon.

LORD STERNDALE M.R. I think myself that this is a quite hopeless appeal. Mr. Sylvain Mayer had said everything that can be said. It is not his fault that the points he has put to us are as bad as they are. I entirely agree with the judgment of Rowlatt J. and think the appeal should be dismissed with costs.

(1) [1921] 1 K. B. 149.

C. A. 1921

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ATKIN L.J. I entirely agree and I say nothing more, except that our decision in this case does not seem to me necessarily to involve an assent to the limited construction put upon the section in question by the Divisional Court in *Craig* v. *Nicholas*. (1)

YOUNGER L.J. I am of the same opinion.

Appeal dismissed.

Solicitors for appellants: *Bull & Bull.*
Solicitor for Crown: *The Treasury Solicitor.*

W. I. C.

1921 *May* 26.

In re OXTED MOTOR COMPANY, LIMITED.

Company — Voluntary Winding Up — Extraordinary Resolution — Notice — Waiver — All Shareholders present at Meeting — Validity of Resolution — Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 69, 182.

By s. 182 of the Companies (Consolidation) Act, 1908, "A company may be wound up voluntarily . . . . (3) if the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up."

By s. 69, sub-s. 1: "A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given."

A creditor obtained judgment against a company in which two persons were the sole directors and shareholders. On the same day the two shareholders met and passed a resolution that it had been proved to the satisfaction of the company that it could not by reason of its liabilities continue its business and that it was advisable to wind up the same, and accordingly that the company be wound up voluntarily, and that a certain person be appointed liquidator for that purpose. No notice of intention to propose that resolution as an extraordinary resolution had been previously given to the shareholders, but the only two shareholders of the company signed the minute of the resolution. A meeting of the creditors of the company was subsequently held, when the voluntary winding up of the company was confirmed and a resolution passed for the

(1) [1900] 2 Q. B. 444.

appointment of a joint liquidator. An order confirming that appointment was made by the county court registrar. Subsequently the registrar, on the application of the judgment creditor, made an order, which was confirmed by the county court judge, setting aside the appointment of the two liquidators on the ground that a valid resolution to wind up the company voluntarily had not been passed:—

Held, that it was competent for the shareholders of the company acting together to waive the formalities required by s. 69 of the Companies (Consolidation) Act, 1908, as to notice of intention to propose a resolution as an extraordinary resolution, and that as all the shareholders of the company had met and passed the resolution to wind up the company, the resolution was valid as an extraordinary resolution within s. 182, and that it was not open to a creditor to impeach its validity.

APPEAL from a decision of the judge of the Croydon County Court.

The Oxted Motor Co., Ld., was a company in which two persons, G. H. Henry and E. L. Tessier, were the sole directors and shareholders.

On November 2, 1920, a Captain Welling Laurie obtained judgment against the company for 857*l.* and costs. A warrant to levy execution was issued to the sheriff on November 3, but he was already in possession of the goods of the company under other judgments.

On November 2, 1920, Henry and Tessier, the only shareholders in the company, met at the works of the company and passed a resolution that it had been proved to the satisfaction of the company that the company could not by reason of its liabilities continue its business, and that it was advisable to wind up the same, and accordingly that the company be wound up voluntarily under the provisions of the Companies Acts, 1908 to 1917. The minute of the resolution was drafted by the solicitor to one of the shareholders and both signed it, one as chairman and the other as director and secretary. Subsequently, on November 4, a paragraph was added to the resolution to the effect that Mr. B. B. McCullum should be appointed liquidator for the purpose of such winding up.

No notice of intention to propose that resolution as an extraordinary resolution had been previously given to the shareholders.

A meeting of the creditors of the company was held on November 22, 1920, at which a resolution was passed

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confirming the voluntary liquidation of the company, and a resolution was also passed for the appointment of Mr. O. Sunderland as joint liquidator in the liquidation of the company.

On December 3, 1920, the registrar of the Croydon County Court, on the application of one of the creditors, made an order that Mr. O. Sunderland should be appointed liquidator to act jointly with Mr. B. B. McCullum, the liquidator appointed by the company; and also that a committee of inspection to act with the joint liquidators should be appointed consisting of five persons, one of whom was Captain Welling Laurie.

The liquidators on February 2, 1921, gave notice of their intention to apply to the registrar of the Croydon County Court for an order to restrain Captain Welling Laurie from proceeding further with the writ of fieri facias under his judgment, and that the execution under the judgment be stayed.

On February 10, 1921, Captain Welling Laurie gave notice of his intention to apply to the registrar of the county court for an order that the appointments of B. B. McCullum and O. Sunderland as liquidators of the company be set aside on the ground that the resolution to wind up the company had not been properly passed.

The registrar of the county court on February 15, 1921, dismissed the application of the liquidators and made an order setting aside the appointment of B. B. McCullum and O. Sunderland as liquidators of the company on the ground that the resolution to wind up the company was invalid.

The liquidators appealed against the order of the registrar to the judge, who made an order on March 17, 1921, dismissing the application.

The liquidators appealed.

Fairfax Luxmoore K.C. and *C. A. J. Bonner* for the liquidators. The county court judge was wrong in affirming the order of the registrar setting aside the appointment of the two

liquidators on the ground that a valid resolution to wind up the company voluntarily had not been passed. By s. 182 of the Companies (Consolidation) Act, 1908, a company may be wound up voluntarily in three ways, one of which is : "if the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up." Sect. 69 provides that "a resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given." In the present case no such notice was given, but the only two shareholders in the company signed a minute of a resolution to the effect that the company could not by reason of its liabilities continue its business and that it was advisable to wind up. It must therefore be taken that the only two shareholders of the company waived the formality of the notice required by s. 69. That notice is required only for the protection of dissentient shareholders, and its object is to ensure that every shareholder should have notice of the intention to wind up the company; it was not intended to make the voluntary winding up of a company more difficult. If a shareholder is present at the meeting of the company at which the resolution to wind up the company is passed it is immaterial whether he has received a notice of the intention to propose that resolution as an extraordinary resolution. A creditor cannot object that a winding up of a company is not valid by reason of some informality in the resolution; only a shareholder can raise that objection, and a shareholder cannot do so who was present at the meeting at which the resolution was passed. Sect. 67 requires, in default of any regulations to the contrary, that seven days' notice in writing should be served on every member of the company before a meeting of the company can be called, but it was held in *In re Express Engineering Works* (1) that it was competent for the

(1) [1920] 1 Ch. 466.

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shareholders of a company acting together to waive all formalities as regards notice of meetings, etc. It is true that in *MacConnell* v. *E. Prill & Co.* (1) it was held that where an extraordinary resolution was proposed to be passed the notice of the general meeting must comply with s. 69 of the Act of 1908. In that case, however, some of the shareholders were objecting to the validity of the resolution, and therefore that case can be distinguished.

W. Higgins (*Engelbach* with him) for Captain Welling Laurie. The county court judge was right in holding that no valid resolution to wind up the company voluntarily had been passed, as no notice had been given as required by s. 69 of the Act of 1908. Unless the provisions of s. 69 are complied with an extraordinary resolution cannot be passed, and the formalities required by that section cannot be waived. Sargant J. pointed out in *MacConnell* v. *E. Prill & Co.* (2) that the prima facie view that any notice is sufficient which sufficiently informs shareholders of the intention to act by way of extraordinary resolution must yield to the plain words of the Act to the contrary.

LUSH J. I think this appeal must be allowed. There is no doubt that all the shareholders in the company (there were in fact only two) met and passed a resolution that the company could not by reason of its liabilities continue its business, and that it was advisable to wind it up, and accordingly that it be wound up voluntarily. It is said that notwithstanding the fact that all the shareholders in the company met and passed that resolution it was not a valid extraordinary resolution because the requirements of s. 69 of the Companies (Consolidation) Act, 1908, had not been complied with. That section defines an extraordinary resolution as a resolution which "has been passed by a majority of not less than three-fourths of such members entitled to vote as are present in person . . . . at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given." There

(1) [1916] 2 Ch. 57. (2) [1916] 2 Ch. 63.

is no doubt that no notice had been given before the shareholders met intimating an intention to propose the resolution to wind up the company as an extraordinary resolution. It is contended that unless the notice contemplated by that section has been given a resolution is invalid as an extraordinary resolution; and it is said that notwithstanding that all the shareholders in the company were present and were dealing with a matter which was intra vires, and notwithstanding that there was no fraud, still the resolution was invalid on that account. In my opinion that contention is not well founded. It would be an extraordinary result if after all the shareholders of a company have been present at a meeting and passed a resolution to wind up the company, afterwards any one else could impeach that resolution on the ground that the shareholders had not had notice of intention to propose the resolution as an extraordinary resolution and that therefore the requirements of s. 69 had not been complied with. In my opinion the shareholders are entitled to waive the formality of notice. *In re Express Engineering Works* (1) is an authority in support of the view that the statutory requirements as to notice can be waived. It is true that in that case the resolution was not a resolution to wind up the company, but a resolution to issue certain debentures. What happened there was this: all the shareholders of the company—there were only five—met as directors at a board meeting, and afterwards in their capacity of shareholders passed the resolution to issue the debentures without any notice having been given for the calling of a general meeting of the shareholders, as required by s. 67 of the Companies (Consolidation) Act, 1908. The company was afterwards wound up, and it was contended by the liquidator that as the requirements of the statute had not been complied with the resolution to issue the debentures was invalid. The Court of Appeal held, affirming Astbury J., that the requirements of the statute were intended for the protection of the shareholders, and that if the resolution was in a matter intra vires the members of the company, and there was no fraud, the shareholders were able to waive all formalities

(1) [1920] 1 Ch. 466.

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Lush J.

as regards notice and that the resolution that had been passed was just as valid as if there had been the requisite notice. Warrington L.J. said (1): "It happened that these five directors were the only shareholders of the company, and it is admitted that the five, acting together as shareholders, could have issued these debentures. As directors they could not, but as shareholders acting together they could have made the agreement in question. It was competent to them to waive all formalities as regards notice of meetings, etc., and to resolve themselves into a meeting of shareholders and unanimously pass the resolution in question." If that is true in the case of a resolution to issue debentures it seems to me that it is equally true in the case of a resolution to wind up a company voluntarily, such as the resolution in the present case. It is said that in the case of an extraordinary resolution the Legislature has made it imperative that the notice required by s. 69 should be given in order to give an opportunity for the shareholders to consider whether the resolution should be passed, and that it is not competent to waive that formality. I cannot see any reason why shareholders should not be able to do in that case what they can do in any other case. In the absence of fraud I think that shareholders can waive notice in this case just as freely as they could in *In re Express Engineering Works*. (2) For these reasons I think the judgment of the county court judge was wrong and that the appeal must be allowed.

GREER J. I agree that this appeal must be allowed. The question is whether the resolution that was passed was a valid and effective resolution to wind up the company. It came about in this way. The only two shareholders in the company met and agreed that it was desirable that the company should be wound up. A minute of the resolution was drawn up by a solicitor and signed by both shareholders. No notice had been given of the meeting or of the intention to propose that resolution as an extraordinary resolution. It is said that the resolution cannot be valid as an extraordinary resolution

(1) [1920] 1 Ch. 470. (2) [1920] 1 Ch. 466.

within s. 182 of the Companies (Consolidation) Act, 1908, owing to the absence of the notice required by s. 69 of that Act. Under s. 182 a company can only be wound up voluntarily in three ways. The third way is: "If the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up." It is provided by s. 69 that "a resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members entitled to vote as are present in person or by proxy . . . . at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given." There was a general meeting of the company in the sense that there was a meeting of the shareholders of the company at which all the shareholders were present, but there had been no notice given of an intention to propose an extraordinary resolution at that meeting or otherwise unless the request to sign the minute of the resolution is a notice of intention to propose the resolution as an extraordinary resolution. The appellant may put his case in two ways; he may say that notice was duly given by reason of what took place verbally between the two shareholders, and that the requirement that the notice should be a seven days' notice was waived. It may also be said that whether the notice required by s. 69 has been duly given or not this is a matter that concerns the shareholders alone, because the Legislature has given the shareholders the right to say whether or not a company shall be voluntarily wound up. The creditors of the company have no voice in the matter, they cannot object to the validity of a resolution to wind up voluntarily by saying that the proper notice to pass that resolution as an extraordinary resolution has not been given, if all the shareholders have agreed to the resolution and waived the want of notice. This view is supported by the decision of the Court of Appeal in *In re Express Engineering Works.* (1) That is a case in which it might be said that the creditors had an interest in the matter, because it arose after the

(1) [1920] 1 Ch. 466.

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company was being wound up and when the interest of the creditors of the company had come into conflict with the interests of the shareholders.

Appeal allowed.

Solicitors for liquidators: *Woodham Smith & Borradaile.*

Solicitor for creditor: *Calvert H. E. Smith, Richmond, Surrey.*

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Nov. 2, 3, 4, 5, 8, 9; *Dec.* 20.

[IN THE COURT OF APPEAL.]

WARE AND DE FREVILLE, LIMITED *v.* MOTOR TRADE ASSOCIATION AND OTHERS.

[1919. W. 2055.]

Action, Cause of—Association of Motor Manufacturers—Certified Trade Union—Prices fixed by Association—Prohibition of Sales at other than fixed Price—Publication of Name in "Stop List"—Libel—Injunction—Trade Disputes Act, 1906 (6 *Edw.* 7, *c.* 47), *s.* 4.

The plaintiffs were dealers in motor-cars. The defendant association was a trade union certified as such under s. 2, sub-s. 3, of the Trade Union Act, 1913, and the other defendants were respectively the chairman and members of the council of the association. The association consisted of manufacturers of motor vehicles and motor goods, and the manufacturers fixed certain prices for their goods, above or below which they deemed it undesirable that their goods should be sold. In order to enforce this object, the by-laws of the association provided that on proof to the satisfaction of the council that any person has offered or advertised or sold any proprietary price-maintained article at a price above or below the price fixed in the protected list, the council might place the name of that person on a list called the "stop list," and give notice thereof to all members of the association (with an exception in the case of contracts existing at the date of admission of the proprietor to membership); and the council might also place on the stop list the name of any person who should supply proprietary price-maintained articles to, or have any trade relations in regard to those articles with, any person whose name was on the stop list. The by-laws further provided that no member of the association should supply any proprietary price-maintained article to, or have any trade relations in regard thereto with, any person whose name was on the stop list. The plaintiffs, who were not members of the association, on behalf of a customer advertised for sale a new motor-car, which was being manufactured by a member of

the association and was to be delivered shortly, at a price exceeding the price fixed by the manufacturer. The council of the association, after hearing the plaintiffs, decided to place their name on the stop list, and published the stop list with the plaintiffs' name, among others, on it in the trade journals. The plaintiffs thereupon brought an action for an injunction to restrain the defendants from publishing the plaintiffs' name in the stop list, or from publishing any libel of the plaintiffs injuriously affecting them in their business. The libel complained of was the publication of the stop list, which stated that "In pursuance of its policy of conserving the fixed retail prices scheduled in its protected lists, the Motor Trade Association issues the subjoined stop list under power of its by-laws. . . . . Until further notice the following parties are not to be supplied directly or indirectly with any of the articles on the protected lists of this Association." Then followed the names and addresses:—

Held, first as to the alleged libel, that, in the absence of evidence that the words would be understood in a meaning other than their ordinary meaning, they were not capable of a defamatory meaning.

Secondly, that the publication of the plaintiffs' name in the stop list was done by the defendants bona fide in the protection of trade interests of the members of the association, and therefore was not unlawful, and an injunction should not be granted.

Allen v. *Flood* [1898] A. C. 1; *Quinn* v. *Leathem* [1901] A. C. 495; and *Conway* v. *Wade* [1909] A. C. 506 discussed.

Hodges v. *Webb* [1920] 2 Ch. 70 approved.

Per Scrutton and Atkin L.JJ. (not expressing a final opinion): Sect. 4 of the Trade Disputes Act, 1906—which provides that "an action against a trade union . . . . in respect of any tortious act alleged to have been committed by or on behalf of the trade union shall not be entertained by any Court"—applies to an action for an injunction to restrain the future commission of a tortious act.

APPEAL from the judgment of Rowlatt J. at the trial of the action without a jury.

The plaintiffs carried on business as dealers in motor-cars. The defendants, the Motor Trade Association (herein called the association), were a trade union certified as such under s. 2, sub-s. 3, of the Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30). The defendant Mobbs was a member and chairman of the council of the association, and the defendants Atkey and Carver were members of the council. The defendant Crane was the solicitor to the association, and acted as the "stop list" superintendent. The plaintiffs claimed "an injunction restraining the defendants, their servants and agents, and each of them, from publishing the name of the plaintiff company in a stop list or black list, or from publishing any

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libel of the plaintiffs injuriously affecting them in their business of dealers in motor-cars, or from publishing any statement calculated to prevent any persons, firm, or company from dealing with the plaintiffs, or calculated to induce any person, firm, or company to break their contracts with the plaintiffs. . . . ."

The objects of the association were set out in a book entitled "Objects, Regulations, and By-Laws." The objects of the association were (inter alia) to encourage, promote, and protect the motor industry in the United Kingdom and throughout the world, and generally to watch over and protect the interests of manufacturers, wholesalers, retailers and users of motor goods and of others having commercial relationship with the motor industry. The association, for the protection of the manufacturer members, instituted a system of fixed prices for certain motor articles entered in a protected list. The manufacturer fixed the prices at which the articles were to be sold to the public, and gave notice of those fixed prices to the association and by advertisement to the public. In pursuance of the policy of fixed prices for motor-cars and accessories on the association's protected list the association published from time to time in various motor trade newspapers a "stop list," containing a list of persons and firms who had sold a protected article at a price varying from the price fixed by the manufacturer, and the members of the association were thereby notified not to supply such persons or firms with any of the articles on the association's protected list.

By regulation 3 of the regulations of the association the qualification for membership of the association was that "the proposed member is, in the opinion of the council, eligible for membership, and engaged in, or has commercial relationship with the motor industry." Regulation 4: "The association shall be divided into the following classes:— (1.) manufacturers of, or sole concessionaires for manufacturers of, motor-cars, which shall be held to include all mechanically propelled vehicles. (2.) (*a*) Manufacturers of motor goods other than motor-cars. (*b*) Factors in motor goods, manufacturers' agents, insurance companies, and sole concessionaires for

manufacturers of motor goods other than motor-cars. (3.) (*a*) Wholesale dealers in cars. (*b*) Retail dealers and others having commercial relationship with the motor industry, and local representatives of members elected in classes 1 and 2. (4.) Motor hirers, being persons, firms, or companies letting motor-cars on hire. (5.) Persons, companies, or firms who, in the opinion of the council, are qualified under regulation 3 for membership at a subscription less than that payable in class 3. . . . ." By regulation 7 the business of the association was to be controlled by a council, consisting of a president, three ex-presidents, thirty-six elected members, and not more than fifteen co-opted members.

The following were the material by-laws of the association:

" 1. On proof to the satisfaction of the council that any company, association, firm or person (all of whom are hereinafter referred to as 'person') has offered or advertised or sold any proprietary price-maintained article at a price above or below that scheduled on the association's protected lists, or price fixed by the manufacturer or concessionaire to which the association has granted protection, the council may place the name of such person on a list to be called the 'stop list,' and give notice thereof to all members of the association or otherwise. This by-law shall cover hire and hire-purchase transactions, and there may be a protected price for hire-purchase transactions, differing from the ordinary protected price.

" 4. No member of the association shall supply any proprietary price-maintained article to, or have any trade relations in regard to proprietary price-maintained articles with any person whose name is on the stop list so long as the name of such person remains on the stop list. Provided that any proprietary price-maintained article supplied under a contract existing at the date of admission to membership of the proprietor, and which the proprietor or his agent has no power to terminate, shall be exempt from the operation of this by-law.

" 5. The council may also place on the stop list any person, whether a member or not, who shall supply proprietary price-maintained articles to, or have any trade relations in regard to

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proprietary price-maintained articles with, any person whose name is on the stop list.

" 6. The council may also place on the stop list any person whose business is to their satisfaction so identified with that of a person on the stop list as to render it desirable in pursuit of the objects of the association.

" 7. No person shall be put upon the stop list without being first invited to explain the allegations made concerning him and being afforded an opportunity of so doing and his explanation (if any) being fairly considered.

" 8. Members of the association shall insert the following clause in all contracts under which they supply any article on the protected lists : ' This contract may be declared at an end by the said (member's name) if at any time the name of the said shall appear on the stop list of the Motor Trade Association, and on such declaration it shall be at an end accordingly, but without prejudice to claims already accrued.'

" 9. The expression proprietary price-maintained article in these by-laws means an article entered and published in the current protected list of the association, or to the price whereof protection has been granted by the association. . . . ."

The stop list was in the following form : " The Motor Trade Association. In pursuance of its policy of conserving the fixed resale prices scheduled in its protected lists, the Motor Trade Association issues the subjoined stop list under power of its by-laws. Complete current stop list No. (All previous lists cancelled.) Until further notice the following parties are not to be supplied directly or indirectly with any of the articles on the protected lists of this Association." (Then followed the names and addresses.) " By order of the Council."

The facts may be shortly stated as follows : The plaintiffs, who were not members of the association, were, in September, 1919, asked by a Mr. Blunt (who was acting as representative of a Mr. Astrom, a Finnish merchant) to sell for him a Vauxhall car. The plaintiffs at least once advertised it for sale as "a new Vauxhall car, delivery in a few weeks." The car was on the association's protected list and the price asked was in

excess of the "fixed price." Complaint was made to the association by the manufacturers, the Vauxhall Motors, Ld., who were members of the association, that the plaintiffs had advertised the car for sale at a price in excess of the fixed price, and the plaintiffs were invited to attend a meeting of the sub-committee of the association on October 8, when the matter would be considered. The plaintiffs did not attend, as the managing director and general manager were both engaged in Paris at the time, and the committee, after considering the matter, recommended the council to place the plaintiffs' name on the stop list. A meeting of the council was held on November 6, of which the plaintiffs received due notice, and the plaintiffs appeared by counsel, who contended that the car was really a "second-hand car," and that it had been advertised as a "new" car by mistake. The council decided to put the plaintiffs' name upon the stop list, subject to the terms contained in the following letter, dated November 8, from the defendants to the plaintiffs: "We write to give you formal intimation of the decision of the council of this Association made on Thursday last and verbally announced to you that the recommendation of the sub-committee to add your name to the stop list be accepted, unless within seven days from Thursday last you accept the following alternative" —namely, to send 50*l.* as a donation to the Cycle and Motor Trade Benevolent Fund, and to give an undertaking to exercise such better supervision as to prevent such an occurrence happening again; neither the donation nor the undertaking to be advertised. The plaintiffs declined the alternative, and issued the writ in the present action on November 11, and the defendants subsequently inserted their name (amongst other names) in the stop list, and published it in motor trade journals.

The statement of claim alleged in para. 2 that the objects of the defendant association were unlawful as being in restraint of trade; and that the members of the defendant association had unlawfully conspired or combined to enforce or to endeavour to enforce the said objects by placing the names of persons who were alleged to have disregarded their rules as

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to prices on the "stop list" referred to in the by-laws. In para. 3, that the defendants threatened to add the plaintiffs' name to the stop list; that such an act would be unlawful as being an endeavour to enforce an illegal agreement and conspiracy or combination by unlawful means—namely, by combined action and threats which if carried into execution would cause loss of business and breaches of contract by persons with whom the plaintiffs had contractual relations, and interference with the legal rights of the plaintiffs to carry on their business and to have free dealings with other persons willing to deal with them. In para. 4, further or in the alternative that the members of the defendant association, including the defendants Crane and Mobbs, with intent to injure the plaintiffs in the way of their business and well knowing that the plaintiffs had contracts with and were in the habit of dealing with members of the defendant association and other persons in the motor trade, wrongfully conspired and combined amongst themselves to procure, cause, and induce those persons to break their contracts with the plaintiffs. In para. 5, further or in the alternative that the members of the defendant association, including each of the other defendants, conspired as aforesaid to induce their members to do or abstain from doing the acts referred to in para. 4 by threats and coercion towards them. In paras. 6 and 7, further or in the alternative that the defendants threatened falsely and maliciously to defame and libel the plaintiffs by publishing the plaintiffs' name in a stop list which was as follows (setting it out). By the said words the defendant association meant and would be understood to mean that the plaintiffs had been guilty of unfair dealing and dishonourable conduct in their business and had thereby injured persons carrying on business in or connected with the motor trade, and the said words would hold the plaintiffs up to public odium and contempt. The plaintiffs claimed the injunction set out above.

Rowlatt J. held that to hold out the prospect of inclusion in the stop list was a "threat," an instrument of coercion. It was a threat primarily to the person whose inclusion was immediately in contemplation, in this case the plaintiffs, and

secondarily to those who might deal with them but for fear of being themselves included. If that was the true view of the facts, this was simply the case of an attempt to prevent a person making a lawful disposition of his own or his principal's property by threats addressed both to him and to those who might deal with him, and he conceived that it was quite unnecessary to go through the authorities to show that such action was wrongful. To put a person in the stop list was to pillory him. The injunction would be granted against the individual defendants. As regards the defendant association, which was a trade union, he would assume as a general rule that, notwithstanding the prohibition in s. 4 of the Trade Disputes Act, 1906, of any action against the trade union for any tort alleged to have been committed by them, he could entertain an action to restrain them from committing one in the future ; but in this case all the facts which afforded ground for an action of tort happened before the issue of the writ, and he did not think he ought to grant an injunction against the association.

The defendants appealed ; and there was a cross-appeal from the refusal of the injunction against the association.

Disturnal K.C. and *D. M. Hogg K.C.* (*Bernard Campion* and *Sir Harold Smith* with them) for the defendants. A combination to do something which is within the right of the association to do is not actionable : *Mogul Steamship Co.* v. *McGregor*. (1) The object which the defendant association and the other defendants had in view in instituting the stop list was not to injure anyone, but to further the business interests of its members, and to enable each of the manufacturer's agents to get the same price for the articles sold and so to earn the same commission on each article.

Rowlatt J. based his decision on these grounds : that Blunt was legally entitled to sell at a profit, that the plaintiffs were legally entitled to aid and abet him in selling, and that the defendants threatened third persons who attempted to sell to the plaintiffs that if they did their names would be put

(1) (1889) 23 Q. B. D. 598 ; [1892] A. C. 25.

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upon the stop list, and that this was an unlawful threat in that it was a threat to injure the plaintiffs and obstruct them in the exercise of their legal rights. This reasoning is fallacious. The fallacy lies in such expressions as "legally entitled to sell" and "legal right to sell." The plaintiffs' right is not an absolute right. Other persons have rights as well as the plaintiffs, and the rights of these others may interfere with the plaintiffs' rights. If they do, the plaintiffs cannot complain. The others have a right to sell; they also have a right to refuse to sell. Moreover three or four may agree together not to sell to the plaintiffs. The agreement may not be enforceable in a court of law: *Hilton* v. *Eckersley* (1); it does not follow that it is illegal. A perfectly lawful act does not become unlawful by being stigmatized as a threat: *Allen* v. *Flood*. (2) A father may threaten to disinherit his son, but that is not an unlawful act. Neither is it unlawful for two parents to agree to leave the one his son and the other his daughter without means if the children insist on marrying each other. The question whether an agreement is illegal depends on its object. The mere fact that it injures another does not make it illegal. The fact that the benefit to the contracting parties must involve injury to third persons is not enough to invalidate it: *Mogul Case*. (3) If the object of the agreement is to injure another, then no doubt the agreement is unlawful: *Mogul Case*, per Lord Watson, Lord Bramwell, Lord Field, and Lord Hannen. (4) The leading instance of such an agreement is *Quinn* v. *Leathem*. (5) But if the object of the agreement is not to injure others but to benefit the parties to it then it is not made unlawful by the use of rhetorical expressions such as "threats," "wrongful, illegal, and malicious conspiracy," and the like: *Scottish Co-operative Society* v. *Glasgow Fleshers' Association* (6); *Allen* v. *Flood* (7), *Sweeney* v. *Coote*. (8) The object of an agreement is in each case a question of fact.

(1) (1856) 6 E. & B. 47, 75.
(2) [1898] A. C. 1.
(3) 23 Q. B. D. 598; [1892] A. C. 25.
(4) [1892] A. C. 42, 44, 52, 59.
(5) [1901] A. C. 495.
(6) (1898) 35 S. L. R. 645, 650.
(7) [1898] A. C. 128, 164, 165.
(8) [1906] 1 I. R. 51, affirmed in H. L. [1907] A. C. 221.

Rowlatt J. has drawn no distinction between agreements reasonably necessary for the protection of the interests of the parties thereto and agreements which go beyond what is reasonably necessary for their protection. *Gregory* v. *Duke of Brunswick* (1) shows the distinction between the act of an individual and a conspiracy. In *Pratt* v. *British Medical Association* (2) McCardie J. found that there was an intent to injure the plaintiffs; a conspiracy to boycott and punish them. The decision on the findings of fact may have been right, but some of the dicta go too far. Peterson J. in *Hodges* v. *Webb* (3) states the true meaning of "threats" and "coercion" in cases of this character: see also *Davies* v. *Thomas*. (4) A conspiracy to effect an illegal object or to effect a legal object by illegal means, if damage is thereby caused to an individual, is actionable. There was nothing illegal in the present case. In *Quinn* v. *Leathem* (5) there was a conspiracy to injure the plaintiff. Lord Shand said (6): "In that case" (*Allen* v. *Flood* (7)) "I expressed my opinion that while combination of different persons in pursuit of a trade object was lawful, although resulting in such injury to others as may be caused by legitimate competition in labour, yet that combination for no such object, but in pursuit merely of a malicious purpose to injure another, would be clearly unlawful." *Temperton* v. *Russell* (8) is to the same effect, and the decision in that case was not shaken in any way by the House of Lords in *Allen* v. *Flood* (7) or in *Quinn* v. *Leathem* (5), though certain dicta of Lord Esher were disapproved. Procuring a person to break his contract with the plaintiff is illegal: *Lumley* v. *Gye* (9); but procuring another not to enter into a contract is not illegal: *Allen* v. *Flood* (7); *Scottish Co-operative Society* v. *Glasgow Fleshers' Association*. (10) A threat by a person to do an act which he is legally entitled to do is not actionable, and the motive is immaterial. There is no question in the

(1) (1843) and (1844) 6 M. & G. 205, 953.
(2) [1919] 1 K. B. 244, 261.
(3) [1920] 2 Ch. 70.
(4) [1920] 2 Ch. 189.
(5) [1901] A. C. 495.
(6) [1901] A. C. 512.
(7) [1898] A. C. 1.
(8) [1893] 1 Q. B. 715.
(9) (1853) 2 E. & B. 216.
(10) 35 S. L. R. 645.

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present case of procuring a breach of contract, as the defendants did not know of any contract, and, further, they provided in the by-laws against any possible breach of contract. [*Rex* v. *Eccles* (1), *White* v. *Riley* (2), and the Trade Disputes Act, 1906 (6 Edw. 7, c. 47), were also referred to.]

Sir John Simon K.C. and *Maugham K.C.* (*Sir Albion Richardson* with them) for the plaintiffs. Prima facie a man may carry on his trade or business without interference from others. Prima facie it is actionable to interfere with him so as to cause him damage, but some forms of interference are justifiable. Interference which merely consists in the active and eager pursuit of the defendant's own trade or business is a justifiable interference. But interference by means of spreading falsehood, or of defamation, violence, or threats of coercive action, or by means of a combination the object of which is not to further one's own trade or business but to interfere with the trade or business of the plaintiff, is not justifiable but is actionable: *Vegelahn* v. *Guntner* (3), cited with approval by Lord Lindley in *Quinn* v. *Leathem* (4); *Giblan* v. *National Labourers' Union* (5), per Romer L.J.; *Glamorgan Coal Co.* v. *South Wales Federation.* (6) "At common law every member of the community is entitled to carry on any trade or business he chooses and in such manner as he thinks most desirable in his own interests, and inasmuch as every right connotes an obligation no one can lawfully interfere with another in the free exercise of his trade or business unless there exist some just cause or excuse for such interference. Just cause or excuse for interference with another's trade or business may sometimes be found in the fact that the acts complained of as an interference have all been done in the bona fide exercise of the doer's own trade or business and with a single view to his own interests (the *Mogul Steamship Case* (7))": *Attorney-General of Australia* v. *Adelaide Steamship Co.* (8),

(1) (1783) 1 Leach C. C. 274.
(2) (1920) 36 Times L. R. 849.
(3) (1896) 167 Mass. 92.
(4) [1901] A. C. 539.
(5) [1903] 2 K. B. 600, 611, 612, 618.
(6) [1903] 2 K. B. 545, 573. Decision affirmed in H. L. [1905] A. C. 539.
(7) 23 Q. B. D. 598; [1892] A. C. 25.
(8) [1913] A. C. 781, 793.

per Lord Parker. That is the true explanation of the decision in *Quinn* v. *Leathem*. (1) Everyone has a right to carry on his own business, and no one can interfere with him unless he can justify the interference. Competition is not an interference to which anyone can legally object. The interference in the present case is not merely competition, as in the *Mogul Case* (2), where there was no threat; it is a threat that, if persons deal with the plaintiffs, the defendants will penalise them. That is actionable: *Davies* v. *Thomas*. (3) The proposition on which the plaintiffs rely is recognized in *Giblan* v. *National Labourers' Union*. (4) It is one thing to say you must choose between our custom and that of the plaintiffs; if you persist in dealing with them you shall not deal with us. There is nothing unlawful in that. But it is a different thing to say: If you continue to deal with the plaintiffs you shall not only cease to deal with us but we will take steps to prevent others from dealing with you. To induce a person not to deal with another is not wrongful, if this be done by lawful means; but to do the same thing by unlawful means is wrongful. Then what are unlawful means? Whatever may be said of other means used, threats of coercive action are unlawful means: *Pratt* v. *British Medical Association*. (5) To use threats of coercion to third persons if they deal with the plaintiffs is not a lawful method or means of inducing those persons to choose between doing business with the plaintiffs and doing business with those who threaten the coercion. To give an example, if a cook and housemaid go together to the mistress and give notice that they will leave her service unless the butler is dismissed, the butler perhaps would have no cause of action; but if they go further and threaten to induce tradespeople to cease from supplying the household with necessaries until the butler is dismissed, there he would have a cause of action. In the present case the learned judge has found that the defendants pursued their object by means of threats to third persons, and he has found this upon ample

(1) [1901] A. C. 495.
(2) 23 Q. B. D. 598; [1892] A. C. 25.
(3) [1920] 2 Ch. 189.
(4) [1903] 2 K. B. 600.
(5) [1919] 1 K. B. 244.

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evidence. The plaintiffs need go no further to establish a cause of action.

With regard to the claim for libel, publication of the plaintiffs' name in the stop list is capable of conveying a defamatory imputation. For instance, the defendants might publish in a trade journal a notice that in the next periodical issue there would appear on a certain page and in a certain column a list of persons who have defrauded them. If a list appeared as notified, that publication would certainly be defamatory. So a stop list is capable of being a defamatory publication. To place the name of a firm or trader upon the stop list is to defame the firm or trader. It is an unlawful means of inducing third persons not to deal with the plaintiffs. (1) Further, the publication of the stop list is a direct incitement to persons to break their contracts. On this part of the case an injunction should be granted. The stop list should be altered so as to warn persons not to break their contracts.

As to the jurisdiction of the Court to grant an injunction, s. 4 of the Trade Disputes Act, 1906, does not affect that. It does not declare that acts which if done by individuals would

(1) *Sir John Simon K.C.* claimed leave to read a typewritten letter subscribed with the initials H. C., which were the same as those of the association's secretary. The letter, it was said, purported to explain the meaning and object of the stop list so as to give it a defamatory meaning.

Disturnal K.C. objected, as there was no evidence that it was written by any duly authorized agent for and on behalf of the defendants. At the trial Rowlatt J. had overruled the objection and admitted the letter.

THE COURT held that the letter was not admissible without further evidence.

Sir John Simon then applied for leave to call the secretary, Miss Helen Cornish. The object and intention with which the words complained of were written were material in considering whether they were defamatory. He cited *Capital and Counties Bank* v. *Henty* (1880) 5 C. P. D. 514, 536, 539; (1882) 7 App. Cas. 741, 744, 772; and *Isaacs* v *Hobhouse* [1919] 1 K. B. 398.

Disturnal K.C. contended that the evidence, if material, ought to have been adduced at the trial: *Shedden* v. *Patrick* (1869) L. R. 1 H. L. Sc. 470, 545; *Nash* v. *Rochford Rural Council* [1917] 1 K. B. 384, 393; and that in the appellants' view it was material, as they said it attached a defamatory meaning to a publication which was not per se defamatory: *Goldstein* v. *Foss* (1827) 6 B. & C. 154, cited by Lord Penzance in *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 760.

THE COURT, for the reasons stated in the judgments, refused the application.

be torts are not to be torts if done by trade unions; it enacts that "an action against a trade union . . . . in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any Court." A trade union may commit a tort just as an individual can. If a tort has been committed no action can be entertained; but that does not preclude an injunction to restrain the future commission of a tort: *Attorney-General* v. *Hackney Local Board* (1); *Flower* v. *Leyton Local Board* (2); Story, Equity Jurisprudence, s. 864.

Disturnal K.C. in reply. The objects of the association are lawful, and no unlawful means are used in carrying out those objects. In *Quinn* v. *Leathem* (3) there was a combination to injure the plaintiff. That was the ground upon which all the learned Lords put their decision. The defendants had a right to do the act complained of. How can the fact of telling the plaintiffs that they would do the act make it unlawful?

With regard to the question of inducing persons to break their contracts, there must be evidence that the defendants knew that there were contracts and induced persons to break them. There was no such evidence in this case.

As to the claim for an injunction against the trade union, s. 4 of the Trade Disputes Act, 1906, prohibits it. An injunction cannot be granted where there is no cause of action.

Cur. adv. vult.

1920. Dec. 20. BANKES L.J. read the following judgment: This appeal raises an extremely important question as to the right of an association of traders to place the name of persons whom they consider to have offended against their by-laws upon a "stop list," which is extensively published in the trade papers. The plaintiffs carry on business as dealers in motor-cars. The defendant association is certified to be a trade union under the Trade Union Act, 1913, s. 2, sub-s. 3. The

(1) (1875) L. R. 20 Eq. 626. (2) (1877) 5 Ch. D. 347.
(3) [1901] A. C. 495.

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defendants, other than the defendant Crane, are members of the association, and members also either of the council or of the stop list committee who dealt with the complaint against the plaintiffs. The defendant Crane is the solicitor to the association, and acted as the stop list superintendent, whose duty it was to report upon complaints submitted to the sub-committee and to the council.

The plaintiffs brought the present action claiming "an injunction restraining the defendants their servants and agents and each of them from publishing the name of the plaintiff company in a stop list or black list, or from publishing any libel of the plaintiffs injuriously affecting them in their business of dealers in motor-cars, or from publishing any statement calculated to prevent any person, firm, or company from dealing with the plaintiffs, or calculated to induce any person, firm, or company to break their contracts with the plaintiffs." The claim was based upon three alternative grounds: (1.) an unlawful conspiracy to injure the plaintiffs; (2.) an unlawful threat to place the plaintiffs' name upon the stop list; (3.) a threat to publish a libel upon the plaintiffs. Rowlatt J., who tried the action, does not deal in his judgment with the first or last of these alleged causes of action. The case for the plaintiffs so far as it relates to the alleged libel is contained in paras. 6 and 7 of the statement of claim. In the absence of evidence that the words complained of would be understood in some other than their ordinary meaning, they are not in my opinion capable of a defamatory meaning. At the trial an attempt was made to put in evidence a copy of the *Autocar* newspaper for December 30, 1916, which was said to contain a communication from the defendant association which would supply the evidence required to establish the fact that the stop list would be understood by those who saw it as casting an imputation upon those whose names appeared in it. A Mr. Lafone, the present editor of the *Autocar*, was called to produce the material documents. He produced a typescript letter on paper headed with the name of the defendant association in print, and at the end of the letter their name typed followed by the initials H. C. He also

produced a manuscript article which the writer of the letter requested might be inserted in the *Autocar* newspaper. The witness knew nothing about these documents, except that they had been sent up to him from the office of the paper at Coventry. All he could say about the signature to the letter was that he thought the initials H. C. were the initials of the secretary of the defendant association. The defendants' counsel objected to the admission in evidence of either the letter, the manuscript, or the newspaper, and the objection was persisted in. The learned judge admitted the documents, thinking apparently that it was a mere useless formality to call the secretary of the defendant association, a Miss Helen Cornish, whose initials were said to be those appended to the signature to the letter. In my opinion the objection was well founded, and if persisted in ought to have been allowed, and the documents rejected, as there was in fact no evidence connecting the defendants, or any of them, with the letter, or with the manuscript, or with the article in the newspaper. In view of the decision of this Court upon this point, Sir John Simon applied for leave to call Miss Helen Cornish as a witness. He said, and said truly, that a great distinction ought to be drawn between a case where a party who has failed in the Court below is endeavouring to turn the failure into a success in the Court of Appeal by the calling of fresh evidence, and a case like the present, where the application is made by the party successful in the Court below for leave to give the technical proof which a too obliging judge was willing to dispense with. In every case the Court must exercise its discretion upon the facts of the particular case. Here the difficulty arises from the position occupied by the witness whom Sir John Simon desires to call. The lady occupies the responsible position of secretary to the defendant association. She it is who has sworn on their behalf the answers to interrogatories and to the affidavits. Once she is in the witness-box, it is not possible to limit her evidence to the one point—namely, whether she is responsible for the writing of the letter to which the initials H. C. are appended. The defendants' counsel may cross-examine her on any point. It seems probable that putting her into the

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witness-box may result in the reopening of the whole trial, and render necessary the calling of still further evidence. Under these circumstances the application to call the further evidence ought not, in my opinion, to be acceded to. As the plaintiffs have failed to establish that the publication of their name in the stop list is capable of being treated as a libel upon them, they fail upon this part of their claim.

The much more important question whether the threat to publish the plaintiffs' name in the stop list is an actionable wrong remains to be considered. Rowlatt J. held that it was. We have had an able and exhaustive examination of all the authorities presented to us by counsel on both sides. It will not, in my opinion, serve any useful purpose to go through these authorities. The problem to be solved is whether, applying the principles to be extracted from the decisions in the House of Lords to the facts of this case, the plaintiffs have made out that the defendants have committed or threatened to commit an actionable wrong.

The decisions in *Mogul Steamship Co.* v. *McGregor* (1), *Allen* v. *Flood* (2), and *Quinn* v. *Leathem* (3) are all in agreement to this extent, that a combination of persons to do some act the object of which is to injure some third person is wrongful and actionable ; so too is a combination of persons to do some act by unlawful means which will have the effect of injuring some third person. It was faintly argued in the present case that the plaintiffs had made out a case of an unlawful conspiracy to injure them. If this case had been tried by a jury, they might have been induced to share the view taken by the jury in *Quinn* v. *Leathem* (3), in which case it might have been difficult to disturb their verdict. As matters stand the evidence is, in my opinion, quite insufficient to establish a case of a conspiracy to injure. If the plaintiffs can succeed at all, it must be upon the ground that the means proposed to be adopted by the defendants to carry out the object of their combination were unlawful.

This raises what is to my mind upon the authorities an

(1) [1892] A. C. 25. (2) [1898] A. C. 1.
(3) [1901] A. C. 495.

extremely difficult question. The material facts upon this part of the case are as follows: The defendant association is composed of persons or firms engaged in, or having commercial relationship with, the motor industry. The members are divided into classes, and they include manufacturers or sole concessionaires of mechanically-propelled vehicles; manufacturers of or factors in motor goods and their agents; wholesale and retail dealers in cars, and others having commercial relationship with the motor industry; persons, firms, or companies letting motor-cars on hire. No evidence was given of the number of persons or firms who were members of the association, but from the evidence of one of the plaintiffs' witnesses, who spoke of the "tremendous" range of proprietary or price-maintained articles, and said that all the accessories and details connected with a motor agent's business in different departments are to a very large extent included in the protected lists, it must, I think, be assumed that the membership of the association must cover, if not all, a very large proportion of the motor trade. The professed object of the association is to maintain the price of all articles entered and published in the current protected list of the association, or the price of which is protected by grant from the association. The means by which this object is sought to be attained is by stopping the supply of any proprietary priced article, not only to any person whether a member of the association or not who sells such an article above or below the protected price, but also by stopping the supply of such articles to any person who supplies such articles to an offending person. The stopping of the supply is sought to be attained by placing the name of an alleged offender on the stop list, which is widely published, and which contains a notice that the persons whose names appear in the stop list are not to be supplied directly or indirectly with any of the articles on the protected lists of the association. The association are not content with placing the name of an offender, or alleged offender, upon the stop list. By-law 5 is in these terms: "The Council may also place on the stop list any person, whether a member or not, who shall supply proprietary

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price-maintained articles to, or have any trade relations in regard to proprietary price-maintained articles with, any person whose name is on the Stop List." The association appear to have been quite alive to the danger of inducing persons to break their contracts with an alleged offender. To meet this difficulty by-law 8 has been introduced. It is not, I think, necessary in the present case to consider what the effect of inserting such a clause in the contracts of members may be, because any ground of complaint that the plaintiffs might have had in reference to the breaking of contracts made with them was removed by an order of this Court made when the appeal in reference to the interlocutory injunction was before it.

The plaintiffs are not members of the defendant association. They advertised a Vauxhall car for sale at a price above the association's protected list price. The association complained upon the ground that the Vauxhall Motor Co. were members of the association, and that it was not permissible for their cars to be offered or sold on terms other than those stipulated by them. The plaintiffs replied that the protected list did not apply to the case, as the car had been placed in their hands for sale by a private customer, and, though new in the sense that it had not been used, it was secondhand in the sense in which that expression must be construed in connection with a protected list of prices. The plaintiffs did not attend the meeting of the sub-committee of the association to which they were invited, and at which the complaint against them was considered, because both the manager and the managing director were engaged in Paris on the date fixed for the meeting. The committee dealt with the matter in their absence, and recommended the council to add the plaintiffs' name to the stop list. The council met on November 6, when the plaintiffs were represented by counsel, who submitted for the consideration of the council the grounds upon which the plaintiffs contended that no infringement of the association's by-laws had been committed. The council confirmed the recommendation of the committee unless the plaintiffs preferred to pay a fine and apologise. The decision of the council was conveyed

to the plaintiffs in a letter dated November 8, 1919: "We write to give you formal intimation of the decision of the council of this association made on Thursday last and verbally announced to you that the recommendation of the sub-committee to add your name to the stop list be accepted, unless within seven days from Thursday last you accept the following alternative, which, under the circumstances put before them by your counsel and yourselves, they have decided to offer you: (1.) That within such period you send us cheque for 50*l.* to be passed by us forthwith to the Cycle and Motor Trade Benevolent Fund as a donation to that charity. (2.) That within the same time you write to us undertaking to exercise such better supervision as to prevent such an occurrence happening again. To prevent misunderstanding, as the point was mentioned in your presence, we may mention that, should you accept the alternative course, neither the apology nor the fine is to be advertised. In dealing with our stop list, the council, as you probably know, sometimes orders undertakings of this sort to be advertised at the expense of the party called to account; whilst in other cases the undertaking is simply filed in this office. The condition attached to your alternative course is of that kind." The plaintiffs preferred to test the legality of the association's proceedings by action, and they issued their writ on November 11.

Their case put broadly is this: The defendants have combined to threaten to punish us for an alleged offence against the rules of the association, of which we are not members, and which offence we have not in fact committed, and in the attempt to coerce us into carrying on our trade according to their rules as interpreted by themselves, they threaten to do us a serious injury by inserting our names in their published stop list. We maintain that such conduct is an actionable wrong. On the other hand, the defendants say that they have done nothing wrong; they claim that they are only exercising their indisputable right to trade, or to refrain from trading, with whom they please, and to give public notice that they will not trade with persons who do not follow their rules as honestly interpreted by themselves, or who supply protected

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priced goods to such persons. Which of these contentions is right? It appears to me to lead only to confusion to dwell too much upon the question whether threats have been used, or coercion or intimidation applied. In a case like the present threats, coercion, or intimidation are only the means to an end. The material question must be whether, if the end sought to be attained is lawful, the means are in themselves unlawful. There are cases in which there can be no doubt as to the unlawfulness of the means used, as for instance where the threats are to use personal violence or to publish a libel. On the other hand, there are many cases in which threats, intimidation, or coercion are lawful and justifiable, even when used by persons acting in combination. Peterson J. has, I think, done good service in drawing attention to this view of the matter in his very instructive judgment in *Hodges* v. *Webb*. (1) In every case the question must be: Is what is complained of unlawful? Are the persons complained of exceeding their legal rights? The distinction between what persons acting in combination may lawfully do and what they may not lawfully do is, I think, well pointed out by Erle J. in his summing-up in *Reg.* v. *Rowlands*. (2) After pointing out that there was nothing unlawful in combination of persons for their own protection and to obtain a benefit which by law they can claim, he goes on to say that a combination for the purpose of injuring another is a combination of a different nature directed personally against the party to be injured; and the law allowing persons to combine for the purpose of obtaining a lawful benefit to themselves gives no sanction to combinations which have for their immediate purpose the hurt of another. Herein, I think, lies the distinction between such cases as *Quinn* v. *Leathem* (3) and *Pratt* v. *British Medical Association* (4) on the one side, and the *Mogul Case* (5) and *Scottish Co-operative Society* v. *Glasgow Fleshers' Association* (6) on the other. In each of these cases there was combination; in each threats and coercion by the combination. In the

(1) [1920] 2 Ch. 70, 87–94.
(2) (1851) 17 Q. B. 671, 686*n*.
(3) [1901] A. C. 495.
(4) [1919] 1 K. B. 244.
(5) [1892] A. C. 25.
(6) 35 S. L. R. 645.

first two cases the combination was held to be unlawful because its object was to injure and punish the individuals threatened. In the last two the combination and the threats used were held to be lawful because the object was merely the legitimate protection of trade interests. There may be cases in which if the matter is looked at merely from a plaintiff's point of view a defendant's action might appear to be unlawful. This is what I think Lord Lindley must have had in mind when in *Quinn* v. *Leathem* (1) he says: "But coercion by threats, open or disguised, not only of bodily harm but of serious annoyance and damage, is prima facie, at all events, a wrong inflicted on the persons coerced; and in considering whether coercion has been applied or not, numbers cannot be disregarded." The question in the present case is not so much whether the plaintiffs have made out a prima facie case as whether the defendants have justified their action. Have they, to use the language of Bowen L.J. in the Court of Appeal in the *Mogul Case* (2), shown "just cause or excuse" for what they did? In his summing-up in *Leathem* v. *Craig* (3) FitzGibbon L.J. left certain questions to the jury as to whether the defendants had acted "wrongfully and maliciously" towards the plaintiff; and in explaining to the jury the meaning of these words he said that they had to consider whether the intent and actions of the defendants went beyond the limits which would not be actionable—namely, securing or advancing their own interests, or those of their trade, by reasonable means, including lawful combination. If the Lord Justice was right in his view thus expressed, that the reasonableness of the action taken by the defendants in the present case was a matter for the Court to consider, then I think that the defendants might have been in a difficulty owing to the fact that they elected to call no evidence. It appears to me, however, that the weight of authority is against the view taken by FitzGibbon L.J. Bowen L.J. in the *Mogul Case* (4) definitely states that it is no part of the duty

(1) [1901] A. C. 540.
(2) 23 Q. B. D. 613 et seq.
(3) [1899] 2 I. R. 671–673. In H. L. sub nom. *Quinn* v. *Leathem* [1901] A. C. 495.
(4) 23 Q. B. D. 618, 619.

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of the Court to inquire whether the action of the defendants in that case was either selfish or unreasonable, but that it was sufficient if it appeared to have been taken bona fide in their own interest in the exercise of their trade. This view of Bowen L.J. does not appear to have been at any time dissented from in the House of Lords, and it appears to have been shared by Lord Hannen in the *Mogul Case* (1), where he says that he knows of no restriction imposed by law on competition by one trader with another.

Accepting this view of the law I cannot come to any other conclusion upon the evidence in this case except that what the defendants did, and what is complained of in the present action, was done by them bona fide in protection of their trade interests. Under these circumstances neither such coercion or threats as were used, nor the acting by the defendants in combination, render their action, in my opinion, unlawful or actionable.

For these reasons the appeal must be allowed with costs, and the judgment for the plaintiffs must be set aside and judgment entered for the defendants with costs. The view which I have expressed renders it unnecessary to consider any of the other points which were raised in argument, or to deal with the cross-appeal, which must also be dismissed with costs.

SCRUTTON L.J. read the following judgment: This appeal raises a number of questions of law, on which in view of the state of the authorities it is very desirable that the House of Lords should make clear the effect of its various decisions.

The Motor Trade Association is a trade union composed of manufacturers in the motor trade, who by the course of that trade sell their goods through agents, who are required to sell at a fixed or list price, getting their profits from the discounts allowed them by the manufacturers. Those engaged in the trade regard it as undesirable that their goods should be sold to the public at either more than the list price, which may prejudice the demand for them and lead to profiteering, or at less than the list price, which may lead to competition

(1) [1892] A. C. 59.

between their agents and dissatisfaction among those who adhere to the list price. The associated traders propose to stop these departures from the fixed price of their goods by refusing to sell their goods to any person, whether he be a member of the association or not, who sells their goods above or below the list price. As the person who acts in this matter might get the goods, which members will not sell to him direct, indirectly through other people, the associated members propose also not to supply their goods to any person who shall supply list price articles to a person whom the members will not supply directly. They propose to inform their members of the persons with whom they must not deal, because they have sold list price goods above or below the fixed price, by putting the names on a "stop list." As notice to their members would not reach non-members, who may buy from members and then sell the goods to the person aimed at, they propose to publish the stop list. The above appears to summarize the system and object of the Motor Trade Association and the by-laws by which it is enforced.

According to the evidence, after the war, when there was a great demand for cars, private persons, many of them speculators, ordered a car from each of a number of manufacturers, hoping to use the first delivered, and sell the rest at a profit. This had the natural result that the order books of the manufacturers did not represent the real demand, but the speculative opinion of the market. As Rowlatt J. said: "If the orders are given that are not orders for cars bona fide intended for the use of the orderer it tends to block up? (A.) (The plaintiffs' witness) Certainly." The association proposed therefore to deal with motor dealers who took part in selling above list price cars which were new in the sense that they had never been used, or indeed delivered by the manufacturer, when they were sold, by putting those dealers on the stop list.

The plaintiffs are motor dealers, not members of the association, who in September, 1919, were asked by a Mr. Blunt to sell "a new Vauxhall car, delivery in a few weeks." The makers' list price was 1125*l.*, and Mr. Blunt contemplated

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getting 1425*l.* for himself plus the agents' commission, and the plaintiffs asked 1625*l.* for it. Mr. Blunt was acting as representative of Mr. Astrom, a Finnish merchant. There is no evidence as to whether Mr. Astrom was speculating in cars or not. This transaction came to the notice of the Vauxhall Company, who complained to the association, who called upon the plaintiffs to appear before the committee of the association. The committee, when the plaintiffs did not appear, recommended the council to put their name on the stop list. The plaintiffs had notice of the meeting of the council, and appeared by legal representatives before the council. They argued that they had really only sold a second-hand car, and said they were most anxious to observe the by-laws of the association. The council determined to put them on the stop list, unless they contributed 50*l.* to the Motor Benevolent Fund and undertook to exercise greater supervision in future. This they declined to do, and issued a writ in the present action. The judge below took a strong view of the term about 50*l.*, which he called "demanding money with menaces." If the stop list was justified, this means of avoiding it was in the plaintiffs' favour; if it is not justified, the alternative way of avoiding it does not seem to make it any worse. It is the commonest transaction to say in a libel action: "I will not issue a writ or ask for damages if you will apologise and pay my costs," but I never heard it called "demanding money with menaces" before. The plaintiffs were in fact put on the stop list, which ran as follows: "The Motor Trade Association. In pursuance of its policy of conserving the fixed resale prices scheduled in its protected lists, the Motor Trade Association issues the subjoined stop list under power of its bye-laws. Complete current stop list No. (All previous lists cancelled). Until further notice the following parties are not to be supplied directly or indirectly with any of the articles on the protected lists of this Association."

One further matter demands attention. The association's by-laws require members to insert a clause in their contracts for the supply of protected articles, that if the name of the

purchaser should appear in the stop list the contract should be at an end; but they contain a proviso that the stop list shall not apply to contracts existing when the member joined the association which he had no power to terminate. These provisions were obviously intended to avoid coming in conflict with the decisions about the illegality of inducements to break existing contracts. Mr. Ware stated that before the council he urged that the stop list would involve the breach of existing contracts, and the chairman said he understood that. The stop list by its terms would in fact only require members who had made, after joining the association, and in breach of the by-laws of the association, contracts without the cancelling clause, to break them; but it would require them to break such contracts, and also to break contracts existing when the member joined the association. In some of the subsequent legal proceedings, on November 24 and 25, 1919, the defendants offered to give an undertaking to discourage any person who had a contract with the plaintiffs from breaking it on knowing their names. The plaintiffs for trade reasons declined to give their names, but were ordered to on a summons for particulars. When they gave the names, the defendants at once wrote to the four names given, stating that the stop list did not involve their breaking any contracts with the plaintiffs. There was no evidence that any person having a contract had in fact broken it; there was evidence that persons did decline to enter into fresh contracts to supply protected goods to the plaintiffs.

Under these circumstances Rowlatt J. found in favour of the plaintiffs on the ground that this was an attempt to prevent a person making a lawful disposition of his own or his principal's property by threats addressed to him and those who might deal with him. Though he mentions a suggested justification by trade interest under the *Mogul Case* (1), and apparently rejects it, he does not make any express finding as to whether the threatened action was taken in protection of trade interests. He makes no finding on, and does not rest his judgment on, any cause of action for

(1) [1892] A. C. 25.

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libel. The threats appear to be threats to do acts which the association has a legal right to do—namely, to refuse to supply goods to the plaintiffs or to persons dealing with them. This case therefore may raise the questions treated as doubtful by Lord Loreburn L.C. in *Conway* v. *Wade* (1), his judgment being concurred in by Lord Macnaghten. He said: "But suppose one person simply induced some one not to employ another or not to serve another, without violence or threat or breach of contract, would an action lie, and in what circumstances, in such a case? I believe there has not been an exhaustive answer to that question. The further difficulty arises, what is a sufficient justification? Is it supplied by self-interest, or by trade competition, or by what other condition or motive? No answer in general terms has ever been given, and perhaps no answer can be given. A parallel difficulty arises where the inducement is by two or more persons acting together." It may further raise the question whether a threat to do an act which you have a lawful right to do can ever be actionable, even if actuated by motives of personal spite. On these matters we were referred to the mass of authorities and dicta, many of them contradictory, contained in at least ten House of Lords Cases, a larger number of decisions of the Court of Appeal, and a number of able and conscientious attempts by judges of first instance to state the results of decisions by which they are bound, and by which they should be enlightened. Of these *Pratt* v. *British Medical Association* (2), per McCardie J., and *Valentine* v. *Hyde* (3), per Astbury J., are recent examples on one side of the controversy, and *Hodges* v. *Webb* (4) per Peterson J. on the other. I have read these cases, some of them several times, and find it quite impossible to harmonise them. The only tribunal which can hope to bring order into chaos is the House of Lords itself, and I do not think any useful purpose would be served by attempting to reconcile or criticise the conflicting statements in these cases. I can only state some points that appear to me to be fairly clear.

(1) [1909] A. C. 506, 510.
(2) [1919] 1 K. B. 244.
(3) [1919] 2 Ch. 129.
(4) [1920] 2 Ch. 70.

I take *Allen* v. *Flood* (1) and *Bradford Corporation* v. *Pickles* (2) to decide that an act otherwise lawful, though harmful, does not become actionable by being done maliciously in the sense of with a bad motive or with intent to injure another. This is Lord Lindley's statement in *Quinn* v. *Leathem* (3) of the effect of *Allen* v. *Flood*. (1) Therefore the reasons given by Lord Esher for deciding *Bowen* v. *Hall* (4) and *Temperton* v. *Russell* (5) in the way he did are erroneous. This is stated by Lord Macnaghten in *Quinn* v. *Leathem*. (6) I take the *Mogul Case* (7) as deciding that a combination to do acts, the natural consequence of which was to injure another in his business, was not actionable, if those acts were not otherwise unlawful, such as assaults, or threats of assaults, and were done in furtherance of the trade interests of those combining. I understand *Quinn* v. *Leathem* (8) to decide that a combination to injure another in his trade and business, not in furtherance of the trade interests of those combining, but out of spite against the person injured, is actionable, and I must take it that the noble Lords who decided *Quinn* v. *Leathem* (8) thought that the acts there proved were subject-matter which might reasonably justify the finding of the jury. Of those acts the inducement to break an existing contract with Dickie would clearly support an action, but I have great difficulty in seeing why the other acts were not in furtherance of the trade interests of the combiners. The workmen took the view that it was important for the interests of workmen that all members of their trade should be members of their union. They therefore endeavoured (1.) to persuade employers to employ only union workmen by stating that, if they did not, union workmen would not work for them. But some masters employed no union workmen; the union therefore endeavoured to induce them to change their system and employ union men by informing them that, if they did not, the union would persuade people who dealt with them

(1) [1898] A. C. 1.
(2) [1895] A. C. 587.
(3) [1901] A. C. 533.
(4) (1881) 6 Q. B. D. 333.
(5) [1893] 1 Q. B. 715.
(6) [1901] A. C. 508.
(7) [1892] A. C. 25.
(8) [1901] A. C. 495.

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not to continue to deal with them. (2.) In pursuance of this combination the union informed a large customer of the employer that, if he continued to deal with the employer, all union men working for him would be withdrawn. These combined acts would appear in effect to be a statement to the employer Leathem and to his customer Munce: "Choose between on the one hand continuing to deal with each other, and having to work without union men, and on the other hand Munce's stopping dealing with Leathem, and enjoying the advantage of union men, and Leathem dismissing his present men and employing only union men." The facts would seem to be very similar to the facts in the *Glasgow Fleshers' Case* (1), where a combination of butchers informed auctioneers that no butcher would buy from them if the auctioneers sold to the co-operative stores, this course being taken to protect the interests of the butchers, by driving their competitors, the co-operative stores, out of business. But Lord Lindley in *Quinn* v. *Leathem* (2), describing the action of the butchers as "threats," said: "There was nothing unlawful in this," and stated the distinction in these words: "The cardinal point of distinction between such cases and the present is that in them, although damage was intentionally inflicted on the plaintiffs, no one's right was infringed—no wrongful act was committed; whilst in the present case the coercion of the plaintiff's customers and servants, and of the plaintiff through them, was an infringement of their liberty as well as his, and was wrongful both to them and also to him, as I have already endeavoured to show." I am quite unable to understand the distinction between the two cases, or to see why the "threats" in the *Glasgow Fleshers' Case* (1) were not like the "coercion" Lord Lindley speaks of in *Quinn* v. *Leathem*. (2) McCardie J., whose judgment in *Pratt's Case* (3) seems to me to reach the extreme limit on one side of the controversy, can only say of the *Glasgow Fleshers' Case* (1), first, that it illustrates the difficulty of this branch of law; secondly, that Lord

(1) 35 S. L. R. 645. (2) [1901] A. C. 539.
(3) [1919] 1 K. B. 244, 264.

Lindley gives the sound explanation in *Quinn* v. *Leathem*. (1) But Lord Lindley speaks of the action of the butchers as "threats," while McCardie J. had just been pointing out (2) that "any element of threat" made actions unlawful. I respectfully concur on this point with the admirable judgment of Holmes J. in *Vegelahn* v. *Guntner* (3), where he remarks that the unlawfulness of "threats" depends on what you "threaten," and of "compulsion" on how you "compel." If you may lawfully do a thing it cannot be unlawful to say you are going to do it; if men may refuse to work for a master, they may surely tell him they propose to do so if he acts in a certain way. In my humble judgment the discussion of this question would be much more lucid if the disputants would observe certain simple rules. First, to avoid question-begging epithets, such as "boycotting," "ostracism," "the pillory," "coercion," and the like. Secondly, when they use the word "maliciously" to say in what sense they use it, whether as connoting personal spite, or intentional action from which harmful consequences to another must follow, or mere unlawfulness. Thirdly, to have in mind the criticism of Bowen L.J. in the *Mogul Case* (4), approved by Lord Watson in *Allen* v. *Flood* (5), on the use of the words "wrongfully," "injure," "maliciously." I cannot think it really helps the matter to say that "wrongfully and maliciously" to do something gives a cause of action: *Quinn* v. *Leathem*. (6) "It is illegal to do wrong," does not carry us very far. Nor is it useful to say that intentionally to employ unlawful means is unlawful (*Pratt's Case* (7)), especially when it is added that means may be unlawful though no act composing the means is unlawful. I do not myself think it helps the discussion to say that, though damage and not conspiracy is the gist of the action of conspiracy (Bowen L.J. in the *Mogul Case* (8)), yet conspiracy will make an act causing damage unlawful which would be lawful if done by one. I respectfully agree with FitzGibbon L.J.'s

(1) [1901] A. C. 539.
(2) [1919] 1 K. B. 264.
(3) 167 Mass. 92, 107.
(4) 23 Q. B. D. 612.
(5) [1898] A. C. 93.
(6) [1901] A. C. 505.
(7) [1919] 1 K. B. 260.
(8) 23 Q. B. D. 616.

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view to the contrary as expressed in *Sweeney* v. *Coote*. (1) Conspiracy appears to me to become actionable when the end is unlawful and causes damage, or the means by which a lawful end is pursued are unlawful and cause damage, and not to be actionable when neither the end nor the means are unlawful. It is said that the end is unlawful if it is to cause damage to another. My comment on this is that it is not true. One may stop underground water from flowing into the land of another, intending to damage him ; one may erect a hoarding to block out light from the windows of his newly erected house, intending to damage him ; one may open a shop next door to him, and intentionally ruin him by selling similar goods to his at unprofitable prices ; and none of these things (and many other instances may be given) are unlawful. It is attempted to explain these cases by saying that there is in each case just cause or excuse for damaging another. The question really is, have you a right to do the act complained of ; if you have, it is immaterial that it injures another. In some specified classes of cases, such as nuisance, the lawfulness of the act may depend on whether you injure another. A man may make an offensive smell on his own land, but will be stopped if the smell becomes a legal nuisance on the land of another. There is here a legal injury to another, and the creation of such a smell is an unlawful act. But this cannot, in my view, be extended by saying a man has a right to trade, and therefore every one must trade with him, and refusal to do so is an unlawful act ; and no one may compete with him, and injurious competition is a wrongful act, because it injures him in his trade.

Apart from considerations of the binding effect of decisions of the House of Lords, the statements of opinion that seem to me personally most enlightening and accurate are the judgment of Lord Herschell in *Allen* v. *Flood* (2), the opinion of Wright J. in the same case (3) ; the admirable judgment of Holmes J. in *Vegelahn* v. *Guntner* (4), and the

(1) [1906] 1 I. R. 51, 109. The decision was affirmed in H. L. [1907] A. C. 221.

(2) [1898] A. C. 114.

(3) Ibid. 62.

(4) 167 Mass. 104. [A dissenting

judgment of Peterson J. in *Hodges* v. *Webb*. (1) But I am, of course, bound by decisions of the House of Lords, and amongst others by the decision in *Quinn* v. *Leathem*. (2) I take that case to decide that, while combinations intended to secure the interests of the confederates in their trade by reasonable and legitimate means are not actionable, combinations which exceed this limit and cause damage by action intended to injure are actionable.

If so the question in this case is whether a combination (1.) intended to secure that new goods shall be sold at a fixed price, neither higher nor lower, by refusing to supply with goods a person who sells those goods at other than the fixed price; and (2.) to inform the confederates who such persons are by means of a stop list; and (3.) to take steps to insure that the person who is not to be supplied with goods directly is not supplied with them indirectly, is a reasonable and legitimate means of protecting trade interests. In my view it is. While low prices may be good for the public for the time, they are not a benefit if all the suppliers are thereby ruined. A steady level price may have considerable advantages over violent fluctuations from very high prices in times of scarcity, and fierce competition and unremunerative prices in times of plenty or financial pressure. This combination seems to me at least as unobjectionable as the combination in the *Mogul Case* (3), which was intended to drive a particular shipowner out of the trade. So far therefore as the injunction prevented the publication of a stop list calculated to prevent any persons from dealing with the plaintiffs, I think it should not have been granted.

There is more difficulty as to that part of the injunction directed against publication calculated to induce persons to break their contracts with the plaintiffs. The defendants' by-laws contemplated that contracts made by members of the association, before they became such members, should be carried out in spite of the stop list. It was assumed that, on

judgment, but the Courts of other jurisdictions are of course free to prefer it.—F. P.]

(1) [1920] 2 Ch. 70.
(2) [1901] A. C. 495.
(3) [1892] A. C. 25.

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becoming members, traders would only make contracts which could be terminated if the other contracting party appeared in the stop list. The association did not consider what would happen to contracts made without the power of cancelling contemplated by the by-laws. It is clear law that a combination to induce persons to break contracts is actionable: *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (1), *Larkin* v. *Long* (2), *Lumley* v. *Gye* (3), and I think the defendants would be well advised to make it clear in any future stop list that existing contracts, not containing a power of terminating them, must be carried out in spite of the stop list. But at the trial there was no evidence that any existing contracts had in fact been broken, and there was evidence that the association had informed any persons of whom they knew who had such contracts that they might be carried out. I appreciate that the association did not at first take this position, but in view of the state of things at the trial and the action of the defendants, the absence of any damage in fact, and the failure of the plaintiffs in the most substantial part of their claim, I do not think it necessary to grant an injunction on this minor point. I do not think there is any risk of future damage under this head.

There remains the cause of action for libel, on which the judge below has apparently expressed no opinion. The material words of the alleged libel are: "In pursuance of its policy of conserving the fixed resale prices scheduled in its protected lists, the Motor Trade Association issues the subjoined stop list. . . . . Until further notice the following parties are not to be supplied directly or indirectly with any of the articles on the protected lists of this Association"; and the list contains the name of the plaintiffs. The natural meaning of this appears to be that the plaintiffs have been selling such articles at other than the fixed prices, and that the members of the Motor Trade Association do not propose to supply them with any more protected articles, either directly or indirectly. This course I have already held they have a right to take,

(1) [1905] A. C. 239. (2) [1915] A. C. 814.
(3) 2 E. & B. 216.

and the question therefore is whether, in the absence of evidence of special circumstances giving a libellous tendency to the words, the statement that you propose to do what you have a legal right to do is capable of a defamatory meaning. In my view the decisions of the House of Lords in *Capital and Counties Bank* v. *Henty* (1) and *Nevill* v. *Fine Art Insurance Co.* (2) bind me to decide this point in favour of the defendants. In the first case Messrs. Henty issued a circular that they would not receive in payment cheques drawn on the plaintiff bank, and this circular was followed by a run on the bank to the extent of a quarter of a million. The House of Lords held that, as Messrs. Henty had a right to refuse such cheques and to say they would refuse them, the circular was incapable of a defamatory meaning. This seems to me to cover the present stop list. The plaintiffs endeavoured at the trial to give evidence of special circumstances affixing a defamatory meaning to the stop list by proving an article in a paper alleged to be inspired by the defendants. Their method of proving this was for the present editor of the paper to produce a typewritten document on paper bearing the printed heading of the association, and with the association's name typewritten at the foot, followed by the written initials H. C. Whose writing the initials were in was not proved by anybody, but it was pointed out that Helen Cornish was an official of the association. I should have thought it was elementary that such evidence alone did not make the document evidence against the association. The document must be proved to be the document of the defendants, and the fact that it purports to be so does not prove it against them. The only further evidence was that the present editor said that some one unknown told him that the document was found on the files of the paper devoted to the defendants' business at Coventry. He himself neither found it nor received it. The learned judge was impatient with what he thought was a technical objection and brushed it aside, the defendants' counsel vigorously objecting all the time. The objection may be technical but was clearly good in law, and we so held during

(1) 7 App. Cas. 741. (2) [1897] A. C. 68.

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the argument of this case. The plaintiffs then applied for leave to subpœna and call before us Miss Helen Cornish. The consequences of this were obvious; she might be cross-examined by the defendants, and with the advantage of leading her they might produce evidence unfavourable to the plaintiffs, who might therefore wish to call some of the evidence they stated at the trial they would abstain from calling, and the defendants might then reconsider their determination not to call witnesses. It was clearly impossible to reopen the whole case in the Court of Appeal, and the alternative of a new trial was suggested. But the plaintiffs had full notice of the objection, and elected to disregard it, and take their chance of getting the document in and keeping it in on the materials they then had. In my view when they have taken this course and proved to be wrong in disregarding what seems to me an obvious and elementary objection, they cannot ask to try again with fresh evidence. This appears to be the principle laid down by the Court of Appeal in *Isaacs* v. *Hobhouse* (1), and in *Nash* v. *Rochford Rural Council*. (2)

I only desire to say further that, as I am in favour of the defendants on general grounds, I do not discuss the question of their individual liability, except to say that I should in any case have considerable doubt as to the position of the defendant Crane.

In view of the result already arrived at it is not necessary to express a final opinion on the cross-appeal, but as the question involved is of some importance I state my present view. The cross-appeal by the plaintiffs is against the decision of Rowlatt J. that the action will not lie against the Motor Trade Association because they are a trade union, in view of s. 4 of the Trade Disputes Act, 1906. This section provides that "an action against a trade union . . . . in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any Court." The cross-appeal was rested on the ground that this did not prevent an action for an injunction, and this in turn was supported by two Chancery decisions, *Attorney-General* v.

(1) [1919] 1 K. B. 398. (2) [1917] 1 K. B. 384.

Hackney Local Board (1) and *Flower* v. *Leyton Local Board.* (2) The latter case allowed proceedings for an injunction without complying with the formalities of s. 264 of the Public Health Act, 1875, which provided that a "writ or process" should not be served without one month's previous notice. The explanation of this may be that "writ or process" was not the correct term to apply to a bill in equity. But I notice that when all these statutes imposing conditions on proceedings against public authorities were consolidated in the Public Authorities Protection Act, 1893, the language used was: "Where any action . . . . or other proceeding is commenced in the United Kingdom" certain conditions shall be fulfilled. In 1898 in *Harrop* v. *Ossett Corporation* (3) it was attempted to argue that the section only applied to the same actions as the Public Health Act, 1875, and did not prevent proceedings in the Chancery Division to obtain injunctions. But Romer J. took the view that "action" covered all actions in the Chancery Division, whether for an injunction alone, or accompanied with damages. In my view the word "action" in the Trade Disputes Act, 1906, has the same meaning. The section however uses the terms "an action . . . . in respect of any tortious act alleged to have been committed." I cannot think these words were intended to exclude an action "in respect of" a tortious act threatened to be committed. The words "in respect of" seem framed with intentional width to cover all remedies asked for in relation to a tortious act, whether committed or about to be committed. It was clearly intended that a trade union should as such be free from liability for damages for tort. A request for an injunction may be dealt with by the Courts leaving the party to his remedy in damages, which, however, could not be given against a trade union. I cannot think that Parliament intended to allow injunctions to be granted in respect of acts for which, when done, no damages could be claimed, and therefore, though I feel I am straining the language of the Act, I must read "alleged to have been committed" as

(1) L. R. 20 Eq. 626. (2) 5 Ch. D. 347.
(3) [1898] 1 Ch. 525.

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including allegations that trade unions are about to commit tortious acts.

The appeal should in my opinion be allowed, and the cross-appeal dismissed, in each case with costs, and judgment entered for all defendants with costs.

ATKIN L.J. read the following judgment: The facts in this case have been sufficiently stated in the judgments which have been read, and I do not propose to repeat them. The plaintiffs' claim in the pleadings is based upon: (1.) A conspiracy to effect an unlawful object—namely, to enforce rules which are unlawful as being in restraint of trade; (2.) A conspiracy to effect the same unlawful object by unlawful means—namely, by combined action including threats which would interfere with the rights of the plaintiffs to trade as they lawfully pleased; (3.) A conspiracy to injure the plaintiffs by inducing members of the defendant association and others to break their contracts with the plaintiffs, and to cease to deal with the plaintiffs. (4.) A conspiracy to induce the members of the association to break contracts and cease to deal with the plaintiffs by threats and coercion. Apart from the claims based upon conspiracy, the plaintiffs further allege that the defendants threatened to publish a libel upon them by publishing their name in a stop list.

The plaintiffs do not allege that they have in fact suffered damage, and the relief they ask is confined to an injunction against publishing their name in a stop list calculated either to injure them in their business, or to prevent any persons dealing with them, or to induce any persons to break their contracts with them.

It is obvious that the pleadings allege the complaint in various ways some of which overlap, but the contentions were before us more closely defined. The learned judge does not appear to treat the allegation of conspiracy as material, at any rate the word is not mentioned in his judgment. He treated the case as one where the defendants were all guilty of a joint wrong—namely, an attempt to prevent the plaintiffs from making a lawful disposition of their property by threats

addressed to the plaintiffs and those who might deal with them. By "threat" he meant an "instrument of coercion." He therefore granted an injunction restraining the defendants from publishing the name of the plaintiffs in any stop list calculated to prevent any persons from dealing with the plaintiffs, or to induce any persons to break their contracts. He did not decide the claim based upon a threat to libel the plaintiffs, and the injunction was accordingly limited as above. From the judgment in this form as against the defendants other than the association there is no cross notice of appeal. The learned judge refused to give relief against the defendant association on the ground that they were a trade union protected by s. 4 of the Trade Disputes Act, 1906. From this refusal there is a cross-appeal by the plaintiffs, and by that appeal they ask for an order against the defendant association in the terms of the claim for relief in the statement of claim, which would include relief in respect of the threat to libel.

Before considering the contentions raised before us, it is necessary to state that there is no finding, no proof, no evidence that the defendants or any of them in doing the acts complained of had any intention to injure the plaintiffs. Moreover in my judgment the facts affirmatively prove that the defendants had no such intention, direct or indirect, and bore no malice or ill-will towards the plaintiffs. The case indeed was argued before us on this assumption; but whether admitted or not the fact is as above stated. It is a fact which, shortly stated, may appear to lose its importance in relation to the lengthy discussion on other points, but I think that eventually it will prove to be the governing factor in the solution of the present problem.

The propositions that were put before us by the plaintiffs, as I understood their argument, were these: (1.) This may have been a combination to protect the trade interests of the defendants, but in seeking to effect that object they acted to the disadvantage of the plaintiffs by interfering with their right to carry on their business as they pleased; and they can only justify that interference by showing that the steps

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they took were reasonably necessary to protect their interests. It was not, I think, an essential part of the contention to throw the onus of proving reasonableness upon the defendants. The point of the contention is that the means were unreasonable (whether unlawful or not) and not merely that the means were unlawful. (2.) Alternatively, this may have been a combination to protect the trade interests of the defendants, i.e., for a lawful object, but it was also a combination to effect the object by unlawful means. Such means were: (*a*) An improper attempt by threats to coerce third parties not to deal with the plaintiffs. (*b*) An attempt to induce third persons to break their contracts with the plaintiffs. (*c*) A proposal to defame the plaintiffs by publishing their name in the stop list.

This last contention raises the question of libel or no libel, but was quite rightly treated in dealing with the question of conspiracy as distinct from the claim to relief based simply on a threat to libel.

It is not necessary to say much in dealing with the first contention. The general proposition could not be put more favourably for the plaintiffs than by Bowen L.J. in the *Mogul Case* (1): "Intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse." I do not stay now to consider whether that proposition is too widely stated. The Lord Justice went on to consider whether the injury was done without just cause or excuse, if done without an intention to injure, but in furtherance of trade interests by a competition carried to a length which is not fair or reasonable. He decides in the negative. He said (2): "There is surely no doctrine of law which compels a man to use his property in a way that judges and juries may consider reasonable: see *Chasemore* v. *Richards* (3)"; and I would add now, "see *Bradford Corporation* v. *Pickles*. (4)" If there is no such fetter upon the use of property known to the

(1) 23 Q. B. D. 613.
(2) Ibid. 616.
(3) (1859) 7 H. L. C. 349.
(4) [1895] A. C. 587.

English law, why should there be any such fetter upon trade? The decision in the House of Lords in the same case (1) indubitably affirms this view. The proposition to the contrary seems to involve the statement that, if a man does an act (*a*) calculated to injure a third person, (*b*) unreasonably, he is liable to an action at the suit of the person injured. The effect of such a doctrine on commerce would be incalculable. I cannot conceive that the common law imposes such grievous fetters upon individual liberty. The truth is that the right of the individual to carry on his trade or profession or execute his own activities, whatever they may be, without interruption, so long as he refrains from committing tort or crime, affords an unsatisfactory basis for determining what is actionable, inasmuch as such right is conditioned by precisely similar right in the rest of his fellow men. Such co-existing rights do in a world of competition necessarily impinge upon one another, and it appears to me illogical to start with the assumption that an interruption of the power of a man to do as he pleases within the law is prima facie a legal wrong, which in every case needs to be justified. The true question is, was the power interrupted by an act which the law deems wrongful? with the practical result that to determine liability one has to concentrate, not upon the effect on the plaintiff, but upon the quality of the act of the defendant. I think that the first contention fails, and that the plaintiffs must succeed, if at all, by showing that the acts done or threatened to be done by the defendants were unlawful.

I proceed therefore to consider the plaintiffs' claim to succeed by reason of an attempt by the defendants by threats to coerce third parties not to deal with the plaintiffs. It is well known that this branch of the law is made difficult by the omission of lawyers to define their terms. In this case, as in so many others, the whole vocabulary of vague vituperation was invoked—threats, menaces, intimidation, coercion, compulsion, molestation, undue interference. It is as well to bear in mind the facts to which they have to be applied. The association consists of members who are engaged in the

(1) [1892] A. C. 25.

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production and distribution of motor-cars and their accessories. It is in their opinion in the interests of their trade that their members' goods should be distributed at their members' fixed prices, no more and no less. That this is a lawful object I have no doubt. Manufacturers of goods in the motor trade are by no means the only class who adopt a similar policy. To insure their object they refuse to sell to anyone who refuses to sell at the fixed or list prices. In order to secure that their goods do not come into the hands of a recalcitrant seller, they refuse to sell their goods to anyone who supplies such a seller; and in order that the names of such sellers may be known to those concerned they publish their names in the trade journals in what is called the stop list, which includes an intimation that until further notice those named in the list are not to be supplied with the goods in question. If the object be lawful, I find it difficult to see why any of the above means of carrying out the object should be unlawful. If I were called upon to decide whether the measures taken by the association were reasonable for the desired purpose, I should myself, I think, find them to be both reasonable and indeed necessary, for I do not know how the object could otherwise be obtained. All the intermediate sellers of goods are not members of the association; the trade is of vast dimensions, and intimation in the trade papers would appear to be a usual and reasonable method of conveying information to members of the trade. However, it is sufficient for me that the association and its members consider the course taken to be desirable in their trade interests. The stage at which the procedure became unlawful varied in the course of the respondents' argument. That the members of the association might refuse to sell to the plaintiffs was admitted. That they might refuse to sell to persons who sold to the plaintiffs was not so clear. But that they might refuse to sell to persons who sold to persons who sold to the plaintiffs, was plainly molestation, undue interference, coercion. And in any case an intimation to members of the trade that, if they sold the protected goods to those on the stop list, they themselves would not be supplied with such goods, was intimidation and threat.

If we have to consider the question whether it is actionable to coerce a third person to act lawfully in a manner calculated to prejudice another, it seems advisable to define our terms. It has to be admitted that the words "coercion" and "threat" are vague terms capable of being applied to conditions which no one would suggest were unlawful. It becomes necessary therefore to seek for some differentia which will distinguish lawful coercion and lawful threat from the unlawful species. No one can gainsay the wisdom of the saying that the uncertainty of the law is a public danger; nor can there be a domain of the law to which that remark is more applicable than the law of torts. I suppose that all men from time to time engage in attempts to induce others to do things they are reluctant to do, and as a part of such inducement make statements of consequences that will follow if the desired result is not achieved. Yet if the layman wishes to keep within the law, high judicial authorities refuse to give him any guidance; he may be told that he must not be guilty of "oppressive misconduct," which is not of much assistance. As a practical result the test whether he has committed a wrong or, if he acts in combination, a crime, appears to turn upon the approval or disapproval of his conduct by the particular judicial tribunal who happens to try the case. It never has been the wont of the common law to measure wrongs by the judicial foot. I think that we can even in the welter of judicial dicta find some firm ground on which to place "coercion" and "threat" as factors in constituting a legal wrong.

What is meant by coercion? If it means no more than procuring a person to do what he does not want to do, it covers many cases where no cause of action can be suggested to exist. The use of parental rights, the use of rights of property, the deprivation of social advantages, may be so applied as to make it plain to the person affected that he must yield or be ruined. A necessary servant or agent may compel advantages to himself or herself by offering as an alternative the withdrawal of his or her services; and in the same way may compel disadvantageous treatment of third parties. I conceive that the logical mind of Cave J. on his

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view of the law was working on lines of necessity in accepting the view that if the cook says to the master: "Discharge the butler or I leave you," and the butler is consequently discharged, the cook is liable to an action. (1) Yet the decision in *Allen* v. *Flood* (2) repudiates this view. In my opinion the wrongfulness of the inducement applied to the third person cannot depend upon its weight. Coercion therefore cannot simply mean successful or even inevitably successful inducement. I am satisfied myself that it means nothing at all on a question of tort except in reference to the means employed.

This brings me to the consideration of inducement by "threats." Here again is a word that requires definition. It appears to me obviously to denote an intimation that consequences will follow disagreeable to the addressee which the threatener has the power to control. It does not necessarily involve any feeling of hostility or ill-will. Intimations of conditional intention to disinherit, to close a place of public resort, to deprive schoolboys of a holiday, would ordinarily be called threats, but do not necessarily import ill-will. The word has had a place in the common law with a definitely restricted meaning. A promise made under duress may be avoided, and duress includes threats, but only threats of personal violence. "Yet it must not be a vaine feare, but such as may befall a constant man": Co. Litt. 253*b*. In the long line of statutes dealing with similar subject-matter to the present, the statutes against combinations of workmen, threats or intimidation intended to affect the relations of master and servant in various specified ways have been made illegal. By the Conspiracy and Protection of Property Act, 1875, s. 7, every person who, with a view to compel any other person to do an act which such other person has a right to abstain from doing, wrongfully and without legal authority uses violence to or intimidates such other person, commits an offence. It was held in *Curran* v. *Treleaven* (3) that intimidation in this section means such a threat of personal violence

(1) [1898] A. C. 36. (2) [1898] A. C. 1.
(3) [1891] 2 Q. B. 545.

as would justify a magistrate in binding over the intimidator to keep the peace. There are provisions in the Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), where obtaining or demanding money or other advantages by menaces is made a criminal offence, but the menaces are defined as being threats to accuse of particular crimes, or to publish defamatory matter, and the like. (1) These are the only instances I know of threats held by the law to be definitely unlawful. For the purposes of the present discussion there may well be other unlawful threats, threats to injure property, or threats to bring proceedings without reasonable or probable cause. But I know of no cases where injury done by threat of a lawful act has been held to be in itself actionable, at the suit either of the person threatened or of the person injured in consequence of the threat. The added element of an intention to injure the plaintiff may make a difference which has to be discussed, but that element is missing in the present case, and would presumably be irrelevant if injury produced by any threat were in itself actionable.

A significant case on this point is the *Glasgow Fleshers' Case* (2), significant because it appears to be approved by Lord Lindley in his speech in *Quinn* v. *Leathem* (3), a speech which may be said to record the high-water mark of the doctrine favoured by the respondents in this case. There the Trade Defence Association had plainly told the auctioneers that their members would not buy from them if they sold to the co-operative societies. The market in which the auctioneers were selling was the only market in Scotland where United States and Canadian cattle could be lawfully landed and sold. Here, if ever, was a compelling inducement addressed to the auctioneers. It was held to afford no cause of action to the co-operative society. There was a further allegation in the pursuers' claim that the defendants had induced divers hide merchants to refrain from purchasing tallow and hides from the society by threatening the hide merchants with a withdrawal of their custom unless they declined to do business

(1) See s. 29. (2) 35 S. L. R. 645.

(3) [1901] A. C. 539.

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with the co-operative societies. This seems even stronger than the present case, for it seems to mean, we will not sell you our hides unless you abstain from buying the plaintiffs' hides. Yet it was held to afford no cause of action. It appears to me that any man has a right to intimate to a third person that he intends to do something which he lawfully may do; that it is immaterial whether the intimation is courteous or the reverse, expressed in terms of hostility or not; and that it is equally immaterial whether or not it affords an irresistible inducement to the addressee to act upon it.

If this be true, does it make any difference that two or more persons in combination make the same statement under the same conditions? We are still discussing a state of facts where there is no intention to injure the person aggrieved. I can appreciate the fact that an act done in combination may be unlawful, while if done by one is not unlawful, as for instance in the case of a combination to do acts intended to injure the plaintiff. It will logically follow that an intimation of an intention to do such an act may be unlawful, though a similar intimation by one person to do a similar act will not. But if two or more in combination intimate an intention to do what the two or more in combination may lawfully do, such an intimation cannot, in my opinion, be an unlawful act.

Now in what respect does an intention to injure the plaintiff affect the legal position stated above? It appears to me to be finally decided by the majority in the House of Lords in *Allen* v. *Flood* (1) that an act otherwise lawful is not made unlawful by an intention to injure, except in the case of a combination to injure. That decision is binding upon every tribunal in the land; it certainly binds the Court of Appeal; and though, after it was given, divers judicial personages more or less respectfully kicked against the pricks, speaking humbly for myself I unreservedly accept the reasoning of the majority judgments.

An illustration of the application of the decision is afforded by comparing the decision in *Lyons* v. *Wilkins* (2), on an application for interlocutory injunction, before the decision in

(1) [1898] A. C. 1. (2) [1896] 1 Ch. 811

the House of Lords in *Allen* v. *Flood* (1), with the decision on the hearing of the action (2), after *Allen* v. *Flood*. (1) In that case the defendants, officers of a trade union, had ordered a strike of the plaintiffs' workmen, and had picketed the plaintiffs' works in order to prevent non-strikers from working for the plaintiffs. In pursuance of the same object they had endeavoured to induce one Schoenthal, who was a sub-manufacturer for the plaintiffs, to cease to work for the plaintiffs, and on his failing to do so had ordered a strike of and picketed his works, and in the interlocutory motion and appeal the picketing both of the plaintiffs and of Schoenthal was found by the Court to be an unlawful besetting within s. 7, sub-s. 4, of the Conspiracy and Protection of Property Act, 1875. The strike against the plaintiffs was held not to be unlawful; but the strike against Schoenthal was held to be unlawful. In the earlier decision Lindley L.J. says (3): "Schoenthal's case is one in which it appears to me that the defendants have clearly gone too far, and it is idle to say that their object in doing what they did to Schoenthal was not to compel Messrs. Lyons to do that which the trade union wanted. Schoenthal was the outworker, and what they did was to tell people not to work for him, in order to prevent his working for Messrs. Lyons, and in order to hit Messrs. Lyons through him." Kay L.J. says (4): "Still more clearly is it illegal to induce a man or to prevent a man in the position of Schoenthal from working for the plaintiffs by calling out the workmen of that man, and inducing them not to work for him, that being done for the purpose of putting pressure both upon Schoenthal and upon Messrs. Lyons by preventing Schoenthal from working for Messrs. Lyons." The interim injunction, as settled by the Court of Appeal (5), after restraining the defendants from watching or besetting the plaintiffs' works for the purpose of, etc., proceeded: "and also from preventing Schoenthal or other persons from working for the plaintiffs, by withdrawing his or their workmen from their employment

(1) [1898] A. C. 1.
(2) [1899] 1 Ch. 255.
(3) [1896] 1 Ch. 826.
(4) Ibid. 830.
(5) Ibid. 832.

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respectively." The difference as between the plaintiffs and Schoenthal is apparent.

The hearing of the action took place before Byrne J. in November, 1897; he reserved his decision until after the decision of the House of Lords in *Allen* v. *Flood* (1), which was given in December, 1897; and gave judgment in February, 1898. (2) He gave effect to the House of Lords' decision by cutting down the injunction in respect of Schoenthal to watching and besetting Schoenthal's premises. The Court of Appeal affirmed this decision (3), but it is noteworthy that the reason now relied on for the decision in respect of Schoenthal was the watching or besetting said to be wrongful, (*a*) because a violation of the statute of 1875, (*b*) because a common law nuisance, i.e., because the means of compulsion were both a crime and a tort. For the reasons I have given above I think that the dictum of Romer L.J. in *Giblan* v. *National Amalgamated Union* (4) is too wide if by "threats or special influence" he includes the use of means in themselves lawful; and I think that, by introducing the element of "the design to carry out some spite," he is seeking to restore to the law the element of confusion which was finally eradicated by the majority in *Allen* v. *Flood*. (1) The case was decided by the majority on the ground that it was a combination to injure.

The case that has caused me real difficulty in this respect is *Conway* v. *Wade*. (5) Lord Loreburn L.C. (6) states the facts to be that "the defendant Wade, in order to compel the plaintiff to pay a fine due to the trade union and to punish him for not paying it, procured Messrs. Readhead & Sons' foreman to dismiss him by threats that unless they dismissed the plaintiff the union men in their service would leave off work, which was not true." The intention to injure the plaintiff is dwelt upon without any reference to *Allen* v. *Flood*. (1) Lord Loreburn discusses the matter as though intention were immaterial (7): "It is material to see in

(1) [1898] A. C. 1.
(2) [1899] 1 Ch. 257.
(3) Ibid. 259.
(4) [1903] 2 K. B. 620.
(5) [1909] A. C. 506.
(6) Ibid. 508.
(7) Ibid. 510.

what circumstances an individual could be sued for inducing some one not to employ or not to serve another . . . . If the inducement was accompanied by violence or threats (always remembering that a warning is one thing and a threat is another) there was a good ground of action." The Lord Chancellor on the next page says: "It is always a source of danger when the law is uncertain." He must have had in his mind some definite conception of what is meant by threat; for the word is consistent with a father threatening to withdraw an allowance if a son insisted on taking a job as a betting tout. It is consistent with "violence or threat of violence," and from the language of Lord James of Hereford (1) it seems probable that that learned Lord considered that such a threat had been proved. "The sense in which the words are used may have to be determined not only by the mere words, but by many surrounding circumstances, even those of voice and gesture." The difficulty is caused by the statement that the threat was that the men would leave off work, a statement of something which they lawfully might do. For the purposes of this case it is sufficient to say that the decision is not inconsistent with the proposition that an intimation that a man is going to do what he lawfully may do is not a threat; for in *Conway* v. *Wade* (2) it was undoubtedly the fact that he had no power to do what he said he would do—namely, call out the men, if in fact that was the threat relied on.

It is now necessary to say something about *Allen* v. *Flood* (3) and *Quinn* v. *Leathem* (4) which were relied on in the argument as throwing light upon the question of coercion and threats. In *Allen* v. *Flood* (3) the act of the defendant complained of was that he had told the manager and foreman of the works where the plaintiffs were employed that unless they were discharged the union men would be called out; that the manager had no option; and that, wherever the plaintiffs were employed, the boiler workers would cease work. The manager gave evidence that if the men had been called out it would have stopped the company's business, and that in

(1) [1909] A. C. 514.
(2) Ibid. 506.
(3) [1898] A. C. 1.
(4) [1901] A. C. 495.

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fear of the threat being carried out he told the foreman to discharge the plaintiffs. The trial judge had ruled that there was no evidence of conspiracy or intimidation or coercion, and the jury found that the defendant had maliciously induced the plaintiffs' employers to discharge them. I have looked at the cases and appendix in this case, and I do not see that there was any cross-appeal from the ruling of the learned judge as to intimidation or coercion. Nevertheless it seems to me that the House of Lords must have thought the question open to discussion, for the question propounded to the judges was: "Assuming the evidence given by the plaintiffs' witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury?" The judges clearly thought the whole matter open, for they discuss the question of threats and intimidation with some freedom. Hawkins J. (1), for instance, stated his opinion that there was abundant evidence fit to be left to the jury that "the defendant has wilfully, unlawfully, unjustly, and tyrannically invaded and violated the plaintiffs' right by intimidating and coercing their employers." It was said in the speeches in *Quinn* v. *Leathem* (2) that the decision of the majority was given on the footing that there were no threats and no coercion. If that be so, the decision appears to show that the majority took the view that what Hawkins J. was able to call intimidation and coercion was not of such a character as to be actionable, even if committed with an intention to injure. I am inclined to think that in one passage Lord Watson definitely lays down the doctrine that I have imperfectly attempted so far to maintain (3): "Assuming that the Glengall Iron Company, in dispensing with the further services of the respondents, were guilty of no wrong, I am willing to take it that any person who procured their act might incur responsibility to those who were injuriously affected by it, if he employed unlawful means of inducement directed against them. According to the decision of the majority in *Lumley* v. *Gye* (4), already referred to, a person who by illegal means, that is means which in themselves

(1) [1898] A. C. 24.
(2) [1901] A. C. 495.
(3) [1898] A. C. 97.
(4) 2 E. & B. 216.

are in the nature of civil wrongs, procures the lawful act of another, which act is calculated to injure, and does injure, a third party, commits a wrong for which he may be made answerable. So long as the word 'means' is understood in its natural and proper sense that rule appears to me to be intelligible; but I am altogether unable to appreciate the loose logic which confounds internal feelings with outward acts, and treats the motive of the actor as one of the means employed by him. It has been maintained, and some of the learned judges who lent their assistance to the House have favoured the argument, that the appellant used coercion as a means of compelling the Glengall Iron Company to terminate their connection with the respondents; but that conclusion does not appear to me to be the fair result of the evidence. If coercion, in the only legal sense of the term, was employed, it was a wrong done as much to the Glengall Iron Company, who are the parties said to have been coerced, as to the respondents. Its result might be prejudicial to the respondents, but its efficacy wholly depended upon its being directed against and operating upon the company. It must be kept in view that the question of what amounts to wrongful coercion in a legal sense involves the same considerations which I have discussed in relation to the elements of a civil wrong as committed by the immediate actor. According to my opinion, coercion, whatever be its nature, must, in order to infer the legal liability of the person who employs it, be intrinsically and irrespectively of its motive a wrongful act. According to the doctrine ventilated in *Temperton* v. *Russell* (1) and the present case it need not amount to a wrong, but will become wrongful if it was prompted by a bad motive." I think, therefore, that *Allen* v. *Flood* (2) supports the view I am expressing. On the other hand it is said that in *Quinn* v. *Leathem* (3) the learned Lords relied upon the use of threats by the defendants to establish the cause of action by the plaintiff. It is true that there are passages in some of the speeches then delivered that describe the conduct of the defendants in calling

(1) [1893] 1 Q. B. 715. (2) [1898] A. C. 1.
(3) [1901] A. C. 495.

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out the men employed by Munce, one of the plaintiffs' customers, as threats. Lord Halsbury in particular says (1) "there was conspiracy, threats, and threats carried into execution." But the case seems to me not to turn in any degree on the evidence as to threats. The foundation of the decision was the principle, expressly reserved in the decision in *Allen* v. *Flood* (2), that a combination to injure may be unlawful where the intention by one is not. The speeches in the House of Lords should be read in conjunction with the judgments under appeal in the Irish Courts (3), which are all based expressly upon the conspiracy to injure. It will be found that Holmes L.J., whose judgment is expressly adopted both by Lord Macnaghten and by Lord Robertson in terms, disclaimed relying upon threats or coercion. He says (4): "I am not prepared to hold that as the case now stands the means proposed were in themselves illegal. The Lord Chief Justice was of opinion that unlawful intimidation and coercion were in contemplation. This question was not left to the jury; and I doubt if there was evidence that anything was intended beyond withdrawing from Munce and Leathem's other customers union labour. The threats instanced by the Lord Chief Justice were not referable to this branch of the case; and under any circumstances I am unable to regard them as of real importance. If there was illegality in the combination, it must, I think, be looked for in the object proposed." I think that the adoption of this judgment in *Quinn* v. *Leathem* (5) by Lord Macnaghten, who was one of the majority in *Allen* v. *Flood* (2), makes it clear that in his judgment at any rate the cause of action was the conspiracy to injure the plaintiff. It appears to me to be beyond dispute that the effect of the two decisions in *Allen* v. *Flood* (2) and *Quinn* v. *Leathem* (6) is this: that on the one hand a lawful act done by one does not become unlawful if done with an intent to injure another, whereas an otherwise lawful act done by two or more in combination does become unlawful if done

(1) [1901] A. C. 507.
(2) [1898] A. C. 1.
(3) [1899] 2 I. R. 667.
(4) [1899] 2 I. R. 776.
(5) [1901] A. C. 511.
(6) [1901] A. C. 495.

by the two or more in combination with intent to injure another. That it is the combination to injure that makes the act unlawful is so plainly laid down in *Quinn* v. *Leathem* (1) that it seems to me with respect useless for judges who are bound by the decisions of the House of Lords to suggest that the fact of combination in that case was only an incidental feature of the case, and not the gist of the matter. See per McCardie J. in *Pratt* v. *British Medical Association*. (2) So far as the judgment in that case lays down as law that an act otherwise lawful becomes unlawful if done by one with an intent to injure, or that a threat by a man to do what he lawfully may is unlawful or becomes unlawful if done with an intent to injure, I think that it is contrary to principle and is incorrect. The ultimate finding in that case that there was a combination to injure is quite sufficient to support the actual decision.

I find myself in complete agreement with the judgment of Peterson J. in *Hodges* v. *Webb*. (3) It is impossible for the law to prevent all oppressive exercise of legal rights. If rights are used tyrannically or to the public danger, the Legislature can control their exercise and impose all necessary checks and safeguards. To enunciate and apply as legal propositions wide prohibitions of misty import may well lead to greater oppression than the evil sought to be repressed.

The remaining part of the case can be dealt with at less length. It is said that the unlawful means used by the defendants were unlawful attempts to induce third parties to break their contracts with the plaintiffs. To induce a person to break his contract is not unlawful unless done knowingly and intentionally; and there is no evidence in the present case that the defendants had any knowledge of contracts between the plaintiffs and third parties, which would be broken by publication of the stop list, or intention to induce third persons to break such contracts. Moreover, so far as their own members were concerned, the defendants were entitled to assume that the cesser clause in by-law 8 was observed. In fact as appears from the particulars delivered on March 5,

(1) [1901] A. C. 495. (2) [1919] 1 K. B. 260.
(3) [1920] 2 Ch. 70.

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1920, there were only six contracts of which the plaintiffs desired to complain, of which two had the clause in question, two more were entered into after the issue of the writ, and two only dated August 13, 1919, and September 29, 1919, might be relevant, though the details of these were not proved. In view of the undertaking given by the defendants before the Court of Appeal and accepted by the plaintiffs, that they would inform any contracting parties, whose names they were given, that existing contracts could be performed, I think it impossible to hold that the defendants ever contemplated any unlawful inducement to break contracts, and the claim based upon this ground fails.

I also think that the plaintiffs failed to establish the use of unlawful means in an attempt to defame the plaintiffs. I agree with what has been said by my brothers in reference to the attempt to put in evidence both below and in this Court the document proffered by the plaintiffs. Whether that document would have affected the issue I do not know, for I have not seen it. In its absence it appears to me that the words used in the stop list are not defamatory; and, if defamatory in any sense which they are capable of bearing, are not false. If they had been proved to be false and defamatory, we should have had to consider whether publication in the trade journal to all the trade was so wide as to defeat a plea of privilege; for if privileged, there seems to me to be no proof of malice. I think that the claim based upon an intended libel fails, whether the intended libel is relied upon as proof of unlawful means used in the alleged conspiracy, or as an independent cause of action. In this respect also I agree with the judgments already delivered.

It follows from what I have said that the cross-appeal against the association fails. But I may say I share the opinion expressed by Scrutton L.J. on the point raised by the cross-appeal.

Appeal allowed; cross-appeal dismissed.

Solicitor for plaintiffs: *Theodore Roberts.*

Solicitors for defendants: *Kenneth Brown, Baker, Baker.*

W. F. B.

[IN THE COURT OF APPEAL.]

C. A.
1921
April 29.

In re KUTNER.

Bankruptcy—Discharge—Condition—Suspension until Debtor has paid 15*s. in the Pound—Jurisdiction—Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 26, *sub-s.* 2 (ii.) (iii.).

Sect. 26 of the Bankruptcy Act, 1914, provides, by sub-s. 2, that, on the hearing of an application for an order of discharge, the Court may either grant or refuse an absolute order of discharge, or suspend the operation of the order "for a specified time," or grant an order subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after acquired property: Provided that the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under the Act connected with his bankruptcy, and shall, on proof of any of the facts thereinafter mentioned, either (i.) refuse the discharge; or (ii.) suspend the discharge for a period of not less than two years . . . .; or (iii.) suspend the discharge until a dividend of "not less than ten shillings in the pound has been paid to the creditors." The facts thereinafter mentioned are specified in s. 26, sub-s. 3.

Where proof had been made of some of those facts—namely (inter alia), that the bankrupt's assets were not of a value equal to 10*s.* in the pound on the amount of his unsecured liabilities, and the Registrar had made an order suspending the discharge until the debtor had paid 15*s.* in the pound to his creditors:—

Held, that there was no jurisdiction under the section to make such an order.

APPEAL from a decision of the Registrar in Bankruptcy.

Nathan Gershon Kutner was adjudicated bankrupt on July 3, 1920.

On March 18, 1921, Mr. Registrar Francke, upon the application of the bankrupt for an order of discharge, and upon taking into consideration the report of the Official Receiver as to the bankrupt's conduct and affairs, made an order in the following terms: "And whereas it has not been proved that the bankrupt has committed any of the misdemeanours or felonies mentioned in Sect. 26 of the Bankruptcy Act, 1914, but proof has been made of the following facts under sub-section 3 of Section 26 of the Bankruptcy Act, 1914, namely:

(*a*) That the bankrupt's assets are not of a value equal to ten shillings in the pound on the amount of his unsecured liabilities.

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(*b*) That the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the 3 years immediately preceding his bankruptcy.

(*c*) That the bankrupt has continued to trade after knowing himself to be insolvent.

(*e*) That the bankrupt has failed to account satisfactorily for a loss of assets (namely for the sum of £4344 4*s*. 10*d*. alleged to have been lost in trading) to meet his liabilities.

(*f*) That the bankrupt has contributed to his bankruptcy by rash and hazardous speculation.

(*i*) That the bankrupt has within three months preceding the date of the Receiving Order, when unable to pay his debts as they became due, given an undue preference to one of his creditors.

And whereas proof has been made of the following facts, that the bankrupt has been guilty of misconduct in relation to his property and affairs, namely : In having after a meeting of his Creditors at which he had given notice of suspension sold under cost price goods for the bulk of which he had not paid and in having paid the proceeds of such sale to his wife and two alleged Creditors, viz., his brother and one R. Paget. In having failed to assist the Trustee, in having failed to furnish certain accounts required by the Official Receiver until the 22nd December, 1920, and in having failed to state the amount of stock held by him in August, 1919 :

" It is Ordered that the Bankrupt's discharge be suspended until a Dividend of not less than fifteen shillings in the pound has been paid to the Creditors, with liberty to the Bankrupt at any time after the expiration of two years from the date of this Order, to apply for a modification thereof pursuant to Section 26 of the Bankruptcy Act, 1914."

Against this order the bankrupt appealed.

Courthope Wilson K.C. and *Tindale Davis* for the appellant. Under s. 26 of the Bankruptcy Act, 1914, as soon as the debtor has paid 10*s*. in the pound upon his debts, he is entitled

to his discharge. It is not therefore in the power of the Court to make an order suspending his discharge until he has paid a larger dividend than 10*s.* in the pound.

[Atkin L.J. referred to s. 26, sub-s. 8.] That was passed in order to meet the decision in *In re Huggins.* (1) The policy of the Act of 1914 is to facilitate discharge. By the Bankruptcy Act, 1869, s. 48, a discharge shall not be granted unless it is proved to the Court that a dividend of "not less than" 10*s.* has been paid. It appears from the General Rules, 1870, rr. 172, 175, that the words "not less than" are equivalent to "equal to." The Bankruptcy Act of 1883, s. 28, did not deal with the 10*s.* limit at all, but it was reintroduced by s. 8 of the Act of 1890.

Under s. 26 of the Act of 1914 the Court may suspend the discharge until the debtor has paid 10*s.* in the pound.

[LORD STERNDALE M.R. The question is whether the operative part of sub-s. 2 does or does not give the Court power to impose the condition. If it does, it is difficult to see how that power is cut down by the proviso.]

The condition imposed here is not a condition of suspension "for a specified time" within s. 26, sub-s. 2.

[Williams' Bankruptcy Practice, 12th ed., p. 116, and *In re Gaskell* (2) were also referred to.]

Sir Gordon Hewart A.-G. and *E. W. Hansell* for the respondent. The proviso to s. 26, sub-s. 2, contains two paragraphs, (ii.) and (iii.), both prescribing a minimum. By para. (ii.) the Court shall, on proof of certain facts, suspend the discharge for a period of not less than two years; or by para. (iii.), it shall suspend it until a dividend of not less than 10*s.* in the pound has been paid. Under (ii.) the period may be more but cannot be less than two years, and under (iii.) the dividend may be more but cannot be less than 10*s.* The section gives a discretion both as to the period of suspension and the amount of the dividend. Under sub-s. 2 there is a general discretion followed by the proviso, which says that in certain circumstances the Court must take a certain course. It is nevertheless consistent that within those circumstances there

(1) (1889) 22 Q. B. D. 277. (2) [1904] 2 K. B. 478.

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is still a discretion. The Legislature has now given control over the granting of the discharge to the Court rather than to the creditors. Under s. 28 of the Bankruptcy Act, 1883, the Court had an unlimited discretion to grant or refuse a discharge, or to suspend it, or to grant a conditional discharge, except where that discretion was expressly limited by the proviso to that section: *In re Barker.* (1) Coming to the present Act, s. 26, sub-s. 2, gives the Court a discretion to grant, or refuse the discharge or suspend its operation for a specified time, or grant a discharge subject to conditions. It is submitted that suspending the discharge until 15*s.* in the pound has been paid is equivalent to suspending it for a specified time. The proviso places a fetter on the discretion in the nature of a minimum, first as to suspension for a period of two years, and secondly as to suspension until a dividend of 10*s.* in the pound has been paid. Apart from that a discretion is left to the Court.

LORD STERNDALE M.R. This appeal has been argued before us on a point which was not before the learned Registrar—namely, whether there is a power to impose, as a condition of granting a discharge, a suspension until a sum exceeding 10*s.* in the pound—in this case 15*s.* in the pound—has been paid to the creditors. I do not say whether it would be well that there should be such a power or not, but in my opinion there is not. The question depends upon the construction of s. 26 of the Bankruptcy Act of 1914. The first sub-section of that section provides that the bankrupt may apply for a discharge. Then the second sub-section, which consists of two parts, which I will call the operative part and the proviso, describes what can be done upon the application for a discharge. The operative part provides: "On the hearing of the application the court shall take into consideration a report of the official receiver as to the bankrupt's conduct and affairs (including a report as to the bankrupt's conduct during the proceedings under his bankruptcy), and may either grant or refuse an absolute order of discharge, or suspend the operation

(1) (1890) 25 Q. B. D. 285.

of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property." Stopping there, it is clear that that part of the section does not authorize such an order as this. The only power of suspension is to suspend the operation of the order for a specified time. It was argued, as an alternative, that this order was a suspension for a "specified time"; in my opinion it is not. To suspend an order until a bankrupt has paid 15*s.* in the pound is suspending it not for a specified but for an indeterminate time. It may be until one year hence, when he comes into money, or it may be until twenty years if he does not. Then comes the proviso. I notice that Lord Esher in *In re Barker* (1) took this view as to the prima facie function of a proviso: "Now the ordinary and proper function of a proviso coming after a general enactment is to limit that general enactment in certain instances. No doubt sometimes a proviso has been used in Acts of Parliament and in other documents to enlarge a previously given discretion; but that is not its proper function." That confirms my own impression, but when you read this proviso it seems to me it is clear that it does enlarge the power of suspension, because the only power of suspension in the operative part being, as I have said, to suspend it for a specified time, the proviso gives power to suspend the discharge until a dividend of not less than 10*s.* in the pound has been paid to the creditors. The material words are: "Provided that the court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under this Act, or any enactment repealed by this Act, or any other misdemeanour connected with his bankruptcy, or any felony connected with his bankruptcy, unless for special reasons the court otherwise determines, and shall, on proof of any of the facts hereinafter mentioned, either (i.) refuse the discharge; or (ii.) suspend the discharge for a period of not less than two years: provided that the period may be less than two years, if the only fact proved of those

(1) 25 Q. B. D. 285, 292.

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hereinafter mentioned is that his assets are not of a value equal to ten shillings in the pound on the amount of his unsecured liabilities; or (iii.) suspend the discharge until a dividend of not less than ten shillings in the pound has been paid to the creditors." Then sub-s. 3 provides: "The facts hereinbefore referred to are—(*a*) That the bankrupt's assets are not of a value equal to ten shillings in the pound on the amount of his unsecured liabilities, unless he satisfies the court that the fact that the assets are not of a value equal to ten shillings in the pound on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible." Then a number of other facts are mentioned, and, as the Registrar has found, some of them have been proved against the bankrupt.

In the first place it seems to me that the words in sub-s. 3 (*a*), as to the fact, which is considered as an offence, of the bankrupt's assets not being equal to a dividend of 10*s.* in the pound, are dealing with the same subject-matter as the words "a dividend of not less then ten shillings in the pound" in sub-s. 2 (iii.), and that throws some light on the question. The offence, if it be an offence, is that the bankrupt's assets are not of a value equal to 10*s.* in the pound. If his assets are sufficient to pay a dividend of 10*s.* in the pound, then so far as that offence, as I call it, is concerned, he is free, and, if he has committed no other offence, he can get an unconditional discharge at once. It would be an odd thing, supposing there were nothing else against him, and if he could get his discharge in that way, that the words used in sub-s. 2 (iii.) (*a*) were to be read as having a different meaning from those used in sub-s. 3 (*a*). Moreover, these words have been used since the year 1869. I quite agree that there has been a tendency since 1869 to take the matter out of the hands of the bankrupt's creditors and to put it more into the hands of the Court, so as to exercise a stricter supervision over the conduct of the bankrupt, but that does not seem to me to alter the meaning of the words used in the previous Acts. And though I still say that I do not think you can interpret an Act by rules made under it, yet it seems to me that in 1870

those who made the rules under the Act of 1869 read those words in the sense contended for by the appellant, and although we have not had all the authorities decided under the earlier Acts brought before us, I have no doubt that such was the sense in which the words were read up to 1914; and the words having been so read ever since they were introduced into the earlier Bankruptcy Acts, must be read in the same sense—namely, that when the debtor has paid 10*s.* in the pound he is considered free as to that requirement. The only contrary argument of any weight is that the words "not less than two years" in sub-s. 2 (ii.) amount to a minimum suspension under the conditions there contemplated, and that sub-s. 2 (iii.) must be read in the same way. I do not think that argument is sound. The words "not less than" are used in different senses in the two clauses of sub-s. 2 because they are dealing with different matters, in one case with what the Court has to do, and, in the other case, with what the bankrupt has to do—namely, where he has to pay not less than 10*s.* in the pound to the creditors. Looking at the whole of the Act, not these two sub-sections alone, and looking at the long previous user of the words, I think the meaning of them is, that so far as this particular requirement goes, the dividend which is to be paid before the suspension of discharge ends, is to be 10*s.* in the pound, and that when that has been paid, then the requirement which is contemplated will have been fulfilled. Therefore, I think an order such as this suspending the discharge until a dividend of 15*s.* in the pound —it might be until 18*s.* or 19*s.* or 20*s.* in the pound—has been paid is not within the power of this section.

For these reasons I think this appeal succeeds, and that the order should be discharged with costs. The matter must be remitted to the Registrar to deal with it in the light of what we consider to be the proper construction of the section. We do not fetter his discretion by saying that he must grant an unconditional discharge, or by telling him what conditions he should impose, except that he cannot now impose this one condition. The matter will be remitted to him to make such order of discharge as he thinks fit, subject to this judgment.

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ATKIN L.J. I agree. The Registrar had to consider this application for discharge, and in the circumstances of the case he had to consider the case under the terms of the proviso to sub-s. 2 of s. 26 of the Bankruptcy Act of 1914. It is quite plain that he proceeded upon that footing because the order of discharge recites a good many of the facts that are mentioned in sub-s. 3, and it is plain, therefore, that he sought to justify making the order in this case under clause (iii.) of sub-s. 2 of s. 26, namely—that where any of the facts mentioned are proved he shall, amongst other things, as one of the alternatives, suspend the discharge until a dividend of not less than 10*s.* in the pound has been paid to the creditors. Now he has made an order suspending the discharge until a dividend of not less than 15*s.* in the pound has been paid. The question is whether that is right, and it appears to me that it is wrong. I think that clause (iii.) fixes definitely what the terms of the suspension can be; it prescribes the order which the Registrar can make; in other words, the power of the Registrar, if he acts under sub-s. 2, is, amongst other alternatives, to suspend the discharge until a dividend of not less than 10*s.* in the pound has been paid. I think myself that is the plain meaning of the words when one looks at the sub-clause and nothing else, but when one remembers the history of this proviso, and the use of the words in the clause, and deals with the other parts of the clause as well, I think that construction is quite plain. One of the facts which deprive the Registrar of his unlimited discretion to grant the order of discharge is the fact that the assets are not equal to the value of 10*s.* in the pound. When that fact is proved, subject to special circumstances, the Registrar is deprived of the discretion, given to him by the first part of sub-s. 2, to grant the discharge, and he must make one of the alternative orders under clauses (i.) to (iv.) of sub-s. 2 mentioned in the proviso; and it appears to me that the power in sub-s. 2, clause (iii.), has a direct reference to the particular facts which give him jurisdiction, or to one of the facts which gives him jurisdiction—namely, that the assets are not of a value equal to 10*s.* in the pound. It certainly would be remarkable, if it were the only

fact relied on as giving him jurisdiction, that whereas if a bankrupt's assets were equal to 10*s.* in the pound no order suspending the discharge could be made, yet if his assets were 9*s.* 6*d.* in the pound the Registrar would have power to suspend the discharge until 20*s.* in the pound had been paid. I do not think that it can have been intended to give to the Bankruptcy Court that large discretion over the future of the debtor. It was said that one should not so construe sub-s. 2, clause (iii.), because the same words "not less than" are to be found in clause (ii.), where there is a discretion to suspend the discharge for a period of not less than two years. It is said, and I think correctly, that in that case the period is a period at the discretion of the Registrar, and that clause (ii.) only provides a minimum of two years, leaving it to the Registrar to fix the period, being not less than two years, for which the discharge is to be suspended; and it is said that you should construe clause (iii.) in the same way, and that the clause only fixes the minimum dividend of 10*s.* in the pound, leaving the Registrar to fix the dividend, being not less than 10*s.* in the pound, until payment of which discharge shall be suspended. To my mind that is not the right way of construing this Act. Under sub-s. 2 a mere order that the discharge is to be suspended for a period of not less than two years would be entirely indefinite in determining the order; it would not determine anything, except that the man was not to be discharged for two years; it would not fix any period, and in some way or other the order would have to be substantially revised so that the man should know exactly what order was made. Under sub-s. 3, where the discharge is to be suspended in certain events, it has a completely different operation; the order is complete and final, and can automatically be worked out. The assets remain in the possession of the Official Receiver or Trustee, and as soon as the assets, supplemented by what the debtor is able to supply either by himself or by his friends—as soon as a dividend of 10*s.* in the pound is paid, then the order automatically works itself out and the discharge is granted by the Court. I think, therefore, that there was no power under this part of the sub-section to alter the terms of

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the Act by giving power to suspend the discharge until a dividend of not less than 15*s.* in the pound has been paid.

That would be sufficient to dispose of this appeal, because it is quite plain from the terms of the order that it was under the power in sub-clause (iii.) that the order was made, but the powers in the first part of the section were also relied upon. It appears to me reasonably plain that unless the facts such as are mentioned in sub-s. 3 are proved, there is no power under the first part of the section to make an order of this kind. It is true, as was said in *In re Barker* (1), the case cited by the learned Attorney-General, that the Registrar may make a conditional order without proof of the special facts which I have referred to; but the conditional order can only be made subject to the conditions which are expressed in the first part of the section —namely, "subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property," and the only other power that he has is to either grant an absolute discharge or to refuse an absolute discharge or to suspend the operation of the order for a specified time.

I agree with what has been said by the Master of the Rolls, that this particular order cannot be said to be an order suspending the operation of the order of discharge for a specified time. For these reasons it appears to me that this appeal should be allowed, and that the case should be remitted to the learned Registrar to make such order as it is in his discretion to make.

YOUNGER L.J. I am of the same opinion. In my judgment the direction which is given to the Court by the first proviso to sub-s. 2 of s. 26 of this Bankruptcy Act, in the event of proof being given of any of the facts set forth in sub-s. 3 of that section, to suspend the discharge until a dividend of not less than 10*s.* in the pound has been paid to the creditors, does not empower the Court to suspend that discharge until a larger dividend has been paid. To give such a power to the Court, and thus, in effect, compel the debtor to work for

(1) 25 Q. B. D. 285.

his creditors to an extent beyond the prescribed sum as a condition of his discharge, is not in my judgment to be implied from the statute. Such a power, having regard to the principles of the law of bankruptcy in relation to this matter, must, I think, be plainly conferred if it is to be held to be exercisable.

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Younger L.J.

Appeal allowed.

Solicitors for appellant: *Harris, Chetham & Cohen.*
Solicitor for respondent: *The Solicitor to the Board of Trade.*

G. A. S.

WELLER *v.* DENTON.

1921 *April* 6.

Business Name—Registration—Action on Contract—Omission to Register—Application for Relief—Grounds of Application—Ignorance of Act—Other Party not Misled—Registration of Business Names Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 58), *ss.* 1, 8.

The plaintiffs in an action made an application under s. 8, sub-s. 1, proviso (*a*), of the Registration of Business Names Act, 1916, for relief against the disability imposed by that section, on the grounds, which were not questioned by the defendant, that at the time when the action was brought they were not aware of the Act or that it was necessary for them to be registered under it, and that the defendant knew that the plaintiffs were the proprietors of the business and was not misled by their failure to register:—

Held, that these were grounds on which the Court, in the exercise of its discretion under the proviso, was entitled to conclude that it was just and equitable to grant to the plaintiffs the relief which they sought, and to grant them relief accordingly.

Ex parte Walker (1889) 22 Q. B. D. 384 considered and distinguished.

APPEAL from Brighton County Court.

On October 7, 1920, the plaintiffs, William Weller and George Weller, trading at Brighton as "The Gloucester Motor Garage," brought an action in the county court against the defendant to recover a sum of 95*l.* alleged to be due to them under a contract for the use of machine tools and personal assistance in constructing models of a window cleaner invented by the defendant.

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At the time when the action was brought the plaintiffs were in default in not having furnished to the registrar a statement of the particulars which they were required to furnish by the Registration of Business Names Act, 1916.

The defendant in his defence said that he was not indebted to the plaintiffs in the sum claimed or in any sum, that the use of the tools was given to him voluntarily and free of charge, that no contract express or implied for the payment of any sum existed, and that no personal service was rendered by the plaintiffs. The defendant also gave notice of the special defence that, if the plaintiffs had any such rights against the defendant as they alleged, these were not enforceable in the action by reason of s. 8, sub-s. 1, of the Act of 1916 (1), inasmuch as at the time when the action was brought the plaintiffs were in default in not having furnished the statement of particulars which the Act required them to furnish.

On November 11, 1920, the plaintiffs gave notice that they would make an application to the county court judge to be relieved from all disabilities imposed by s. 8 of the Act of 1916 to which they were liable by reason of their default in furnishing the statement of particulars for registration under the Act to the Registrar from February 1, 1918, until November 11, 1920.

In a joint affidavit made by them in support of the application the plaintiffs said (inter alia) that for some years the

(1) Registration of Business Names Act, 1916, s. 8: "(1.) Where any firm or person by this Act required to furnish a statement of particulars or of any change in particulars shall have made default in so doing, then the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business in respect to the carrying on of which particulars were required to be furnished at any time while he is in default shall not be enforceable by action or other legal proceeding either in the business name or otherwise:

"Provided always as follows:—

"(a) The defaulter may apply to the Court for relief against the disability imposed by this section, and the Court, on being satisfied that the default was accidental, or due to inadvertence, or some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may grant such relief either generally, or as respects any particular contracts. . . . ."

premises known as The Gloucester Motor Garage, then occupied by them as their place of business, had been used by successive owners or tenants as a motor garage and repair shop, and had been known as The Gloucester Motor Garage; that the plaintiffs took over the tenancy of the premises in February, 1918, and continued to use the name of The Gloucester Motor Garage, but added thereto the words "W. & G. Weller, Proprietors" upon the premises and on their stationery, and, so far as they were aware, no person had ever been misled as to who were the proprietors of the business; that they were not aware of the Act of 1916, or that it was necessary or compulsory for either or both of them to register under that Act; that having no knowledge and being unaware of the Act, neither of them was registered under it at the date of the commencement of the action, but that on October 29, 1920, their attention was called to the Act, and that since that date they had registered themselves in pursuance thereof; that the defendant was not misled by the plaintiffs' failure to register, and knew that the plaintiffs were the proprietors of the business; that the plaintiffs were both British subjects born in England of British parents, and that they had never previously carried on business either separately or together or otherwise under a trade name; and that they sought relief under s. 8, sub-s. 1 (*a*) (1) of the Act.

On November 11, 1920, an order was made adjourning the application to a future day, and directing that notice of the application should be published in the *Sussex Daily News* of November 13, 1920, and served upon the defendant within two days of the date thereof. That order was duly complied with.

On November 18, 1920, the application was heard, both parties being represented. The county court judge was of opinion that it was "just and equitable" within the meaning of s. 8, sub-s. 1 (*a*) (1), that the relief applied for should be granted, inasmuch as the result of refusing relief would be to make impossible the hearing of the action, which was not

(1) See note ante, p. 104.

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shown to be frivolous or vexatious or otherwise one not proper to be brought; and he accordingly granted the plaintiffs' application, directing them to pay the costs of it.

The defendant appealed.

R. T. Monier-Williams for the defendant. The county court judge in granting the plaintiffs' application exceeded the discretion given to him by the Registration of Business Names Act, 1916, s. 8, sub-s. 1, proviso (*a*). (1) He ought not to have been satisfied on any of the grounds mentioned by the plaintiffs or by himself that the case was one in which it was "just and equitable" within the meaning of that proviso to grant the plaintiffs relief against the disability imposed upon them by that sub-section. The fact that the plaintiffs were ignorant of the Act was no sufficient ground for holding that it was just and equitable to grant relief. Ignorance of the law is no excuse for failing to comply with its requirements. In *Ex parte Walker* (2), where the applicant, who had incurred a penalty under an Act, applied for relief on the ground of his ignorance of the Act, the Court of Appeal only reversed the decision of the Divisional Court and granted him relief because another Court had previously granted relief in similar circumstances, and the Court of Appeal plainly announced that in future cases ignorance of the Act would not be a ground for relief. As to the other ground relied on—namely, that the refusal of relief would make impossible the hearing of the action which had not been shown to be frivolous or vexatious or otherwise not proper to be brought—the effect of treating that as a sufficient ground for holding it just and equitable to grant relief would be to nullify the Act, the plain intention of which is that a person who makes default in complying with its requirements should not maintain an action, however strong his case may be upon the merits.

Norman Birkett (*John Flowers* with him) for the plaintiffs. The county court judge, in granting the plaintiffs' application, did not exceed his discretion under s. 8, sub-s. 1, proviso (*a*). (1)

(1) See note ante, p. 104. (2) 22 Q. B. D. 384.

The grounds upon which he based his decision were grounds upon which he was entitled to come to the conclusion that it was just and equitable to grant the application. Where the defendant has not been misled by the plaintiff's failure to comply with the requirements of the Act, the plaintiff's ignorance of the Act is a good ground for granting him relief from the disability imposed by the section: *In re Smith.* (1) [He was not required to continue his argument.]

BRAY J. In my opinion this appeal should not succeed. The plaintiffs, Messrs. William and George Weller, who carried on business at Brighton as "The Gloucester Motor Garage," brought an action in the county court against the defendant to recover a sum of 95*l.* alleged to be due under a contract entered into between them and him in relation to the business. At the time when the action was brought the plaintiffs were in default in not having furnished to the registrar a statement containing the particulars which they were required to furnish by the Registration of Business Names Act, 1916. The defendant gave notice of the special defence, founded on s. 8, sub-s. 1 (2), of the Act, that as the plaintiffs had made default in furnishing that statement their alleged rights under the contract were not enforceable in the action. The plaintiffs then made an application under proviso (*a*) (2) to that sub-section. [His Lordship read the proviso.] In support of the application the plaintiffs made an affidavit in which they set forth the grounds on which they made the application. [His Lordship read the material parts of the affidavit.] On reading that affidavit the county court judge, under the powers given him by the Act, made an order that the application should be adjourned, and that notice of it should in the meantime be served upon the defendant; and notice was served on him accordingly. Afterwards the application was heard by the county court judge, both parties being represented. The county court judge came to the conclusion that the case was one in which it was "just and equitable to grant relief" within the meaning

(1) [1920] W. N. 115. (2) See note ante, p. 104.

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of proviso (*a*). In my opinion the decision of the county court judge was right. It appears from the plaintiffs' affidavit, the statements in which are not disputed by the defendant, that there were here several facts which rendered it just and equitable that relief should be granted to the plaintiffs. There was the fact that the plaintiffs added to the name of "The Gloucester Motor Garage," by which the premises were known, the words "W. & G. Weller, Proprietors." There are the facts that the plaintiffs were not aware of the Act of 1916, or that it was necessary or compulsory for them to register under it, and that being unaware of the Act they were not registered under it at the date of the commencement of the proceedings, but that on their attention being called to the Act they had since that date registered themselves in pursuance thereof. It was a further fact that the defendant was not misled by the plaintiffs' failure to register, and knew that the plaintiffs were the proprietors of the business and with whom he was dealing. Having regard to these facts, I think the case was well within the discretion given by the Act to the county court judge to grant relief in a case in which it is just and equitable to do so.

LUSH J. I agree. I only desire to add that *Ex parte Walker* (1) was very different from the present case. In that case a candidate at the first election of county councillors under the Local Government Act, 1888 (51 & 52 Vict. c. 41), who had inadvertently incurred a penalty for an illegal practice, applied to the Court for relief on the ground of his ignorance of the provisions of the Act. The Court of Appeal, on the case coming before it, granted the candidate relief largely on the ground that another Court had previously granted relief to other candidates in precisely similar circumstances; and intimated that in the case of any future election ignorance of that Act might not be considered a ground for relief. The reason for that intimation may be gathered from the observations of Fry L.J. (2), who referred to "the recklessness with which people seek to be appointed to offices

(1) 22 Q. B. D. 384. (2) 22 Q. B. D. 390.

without previously taking any trouble to inform themselves of the nature of the duties and liabilities which are attached to those offices." A person who offers himself as a candidate for election to an office is under a strong obligation to know the conditions with which he must comply in order to be qualified for election, and the duties which he will have to discharge if he is elected.

This case is entirely distinguishable from that. The Act of 1916 with which the Court is at present dealing requires firms and persons carrying on business in this country to be registered under its provisions: and provides that where a person is in default his right under a contract entered into in relation to the business shall not be enforceable by action. The Act, however, gives to the Court the widest possible powers of granting relief to persons in default. It provides that the Court on being satisfied that the default was accidental, or due to inadvertence, or some other sufficient cause, or that "on other grounds it is just and equitable to grant relief" may grant such relief. The reason why this wide power of granting relief should be given to the Court can well be understood. Where the defendant has not been misled, and knew the members of the firm or other persons with whom he was dealing, it might be most unjust and inequitable to hold that the plaintiff's action should not be maintainable merely because he did not know that he ought to have been registered under the Act. In the present case I think that the facts that the plaintiffs were not aware of the Act or that it was necessary for them to register under it, and that the defendant knew with whom he was dealing, were sufficient to give the county court judge jurisdiction to grant the plaintiffs' application for relief.

Appeal dismissed.

Solicitors for appellant: *Routh, Stacey & Castle, for F. H. Carpenter, Brighton.*

Solicitors for respondents: *J. K. Nye & Donne, Brighton.*

J. R.

C. A.
1921
Feb. 9, 10, 11;
March 11.

[IN THE COURT OF APPEAL.]

N. JOACHIMSON (A FIRM NAME) *v.* SWISS BANK CORPORATION.

[1919. J. 707, 1289.]

[MANCHESTER DISTRICT REGISTRY.]

Banker—Customer—Current Account—Debt—Necessity for Demand—Implied Term—Cause of Action.

Where money is standing to the credit of a customer on current account with a banker, in the absence of a special agreement a demand by the customer is a necessary ingredient in the cause of action against the banker for money lent.

Pott v. *Clegg* (1847) 16 M. & W. 321 and *Foley* v. *Hill* (1844) 1 Ph. 399; (1848) 2 H. L. C. 28 considered.

APPEAL from the judgment of Roche J. at the trial of the action without a jury.

On August 1, 1914, and for some time before that date the firm of N. Joachimson, the plaintiffs in this action, carried on business in Manchester. There were three partners in the firm, Siegfried Joachimson and Jacob Joachimson, who were both German subjects, and L. E. Marckx, a naturalized British subject residing in England. The firm had a banking account with the defendant bank in London. On August 1, 1914, S. Joachimson died, and the partnership became thereby dissolved. On that date a sum of 2321*l.* was standing to the credit of the partnership on current account. On the outbreak of war with Germany on August 4, 1914, Jacob Joachimson, who resided in Hamburg, became an alien enemy. No money was paid out of the banking account after August 1, 1914. On June 5, 1919, Marckx commenced this action in the firm name, for the purpose of winding up the affairs of the partnership (1), to recover the said sum of 2321*l.* as money lent by the plaintiffs to the defendants as bankers, or alternatively as money received by the defendants as bankers for the use

(1) See *Rodriguez* v. *Speyer* [1919] A. C. 59.

of the plaintiffs. Upon the defendants' application on March 16, 1920, for particulars of the statement of claim the plaintiffs gave an undertaking that the only causes of action relied on arose on or before August 1, 1914 : see Order XLVIIIA., r. 1. No demand was made by the plaintiff firm on or before that date for the repayment by the defendants of the sum claimed. The defence (so far as material to this report) was that, as no demand was made, no cause of action had accrued to the plaintiffs on August 1, 1914, and that therefore the action was not maintainable. (1)

Roche J. held, upon the authority of *Pott* v. *Clegg* (2) and *Foley* v. *Hill* (3), that the debt owing by a banker to his customer was in the same position in this respect as a debt owing by any other debtor, and could be sued for without any previous demand ; that the evidence given by bankers to show a custom differentiating the case of bankers from that of other debtors failed to prove any such custom ; and he gave judgment for the plaintiffs for the amount claimed. (4)

The defendants appealed.

Schwabe K.C. and *Conway* for the defendants. There was no existing cause of action on August 1, 1914, when the partnership was dissolved, as no demand for the money was made. Money placed with a bank on current account is, no doubt, in the position of money lent by the customer to the bank : *Pott* v. *Clegg* (2) ; *Foley* v. *Hill* (3) ; but all the incidents of an ordinary transaction of loan do not exist. For instance, the bank is not obliged to seek out the customer and pay him the amount. The debt is only payable at the bank during banking hours. Further, a demand is necessary before the bank can be sued. If this were not so the customer could sue the bank the moment the money was paid into the bank. In the ordinary case of money lent no demand is necessary before bringing an action against the debtor : *Norton* v.

(1) There was a counterclaim for a sum exceeding that claimed, but it is unnecessary to refer to it further.

(2) 16 M. & W. 321.

(3) 2 H. L. C. 28.

(4) Other points were raised both before Roche J. and the Court of Appeal, to which it is unnecessary to refer.

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JOACHIMSON v. SWISS BANK CORPORATION.

Ellam (1); *In re Brown's Estate.* (2) A demand is necessary in the case of a surety: *Bradford Old Bank* v. *Sutcliffe.* (3) In *In re Tidd* (4) North J. held that the Statute of Limitations did not begin to run against a person who had entrusted money to another for safety until demand, though it was contemplated that the bailee might use the money in business. In *Pott* v. *Clegg* (5) the point that a demand was necessary to give a cause of action to recover money on current account at a bank was not pleaded, and therefore could not be raised; so the case is no authority upon the point. In *Foley* v. *Hill* (6) Lord Lyndhurst L.C. decided the case on two grounds, first, that the Statute of Limitations applied, the relation of banker and customer not being a fiduciary relation; and secondly, that a simple account between banker and customer was not the proper subject for a bill in equity. There again the question of the necessity for a demand was not argued. In the House of Lords (7) the decision was that the claim was not the proper subject-matter of a bill in equity, the relation of banker and customer being merely that of debtor and creditor. The necessity for a demand was not discussed, but Lord Cottenham L.C. said (8) that the banker had contracted to repay, "when demanded," a sum equivalent to that paid into his hands; and Lord Brougham spoke (9) of the banker's duty being to repay the money "when asked." The contract which a banker enters into with his customer is that the banker will receive on account of the customer any moneys paid into his account, the banker having liberty to use the money in his business, and will on demand by the customer pay to the customer or to his order at the bank during business hours any amount not exceeding the credit balance; and sometimes there is the additional term that the banker will pay interest on the balance due; and further, that the banker will not terminate the relation without giving the customer reasonable notice.

(1) (1837) 2 M. & W. 461.
(2) [1893] 2 Ch. 300.
(3) [1918] 2 K. B. 833.
(4) [1893] 3 Ch. 154.
(5) 16 M. & W. 321.
(6) 1 Ph. 399.
(7) 2 H. L. C. 28.
(8) Ibid. 36, 37.
(9) Ibid. 43.

The evidence given at the trial as to the custom of bankers supports this view of the contract.

[ATKIN L.J. referred to *London Joint Stock Bank* v. *Macmillan*. (1)]

There having been no demand on or before August 1, 1914, no cause of action existed on that date.

[*Marzetti* v. *Williams* (2); *Agra Bank* v. *Hoffman* (3); *Atkinson* v. *Bradford Building Society* (4); *George Clare & Co.* v. *Dresdner Bank* (5) were also cited.]

R. A. Wright K.C. and *Wilfrid Lewis* for the plaintiffs. The relation of banker and customer is that of debtor and creditor with the superadded obligation to honour the customer's cheques to the amount of the moneys standing to his credit in his current account: *Foley* v. *Hill*. (6) In *London Joint Stock Bank* v. *Macmillan* (7) Lord Haldane said: "Ever since this House in 1848 decided *Foley* v. *Hill* (8) it has been quite clear that the relation between a banker and the customer whose balance he keeps is under ordinary circumstances one simply of debtor and creditor." There are certain limitations upon the bank's obligation to pay cheques of the customer. The bank is only bound to cash cheques during banking hours and at the branch upon which the cheque is drawn. But a cause of action for money lent arises upon the money being deposited on current account, and the Statute of Limitations runs from that date without any demand: *In re Tidd* (9); *George Clare & Co.* v. *Dresdner Bank*. (5) *Foley* v. *Hill* (6) is always cited in text-books for the proposition that in the case of money on current account at a bank the relation between the banker and customer is the ordinary relation of debtor and creditor: see Halsbury's Laws of England, tit. Bankers and Banking, vol. i., p. 585, s. 1196. Lord Lyndhurst (10) did so decide—namely, that the Statute of Limitations ran from the date of payment in, and the House of Lords (8), while not

(1) [1918] A. C. 777, 814.
(2) (1830) 1 B. & Ad. 415.
(3) (1864) 34 L. J. (Ch.) 285.
(4) (1890) 25 Q. B. D. 377, 381.
(5) [1915] 2 K. B. 576.
(6) 1 Ph. 399; 2 H. L. C. 28.
(7) [1918] A. C. 814.
(8) H. L. C. 28.
(9) [1893] 3 Ch. 154.
(10) 1 Ph. 399.

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deciding that point, expressed no dissent from Lord Lyndhurst's view. The word "demand" as used in some of the cases is, as pointed out by Scrutton L.J. in *Bradford Old Bank* v. *Sutcliffe* (1), meaningless, and he cites *Norton* v. *Ellam* (2), the case of a promissory note payable on demand, where express demand is not necessary. The precedent in Bullen and Leake's Precedents of Pleadings, 3rd ed., p. 41, of the common indebitatus count for money lent does not mention demand, and in the note it is stated that "money deposited by a customer with a banker may be thus recovered." A garnishee order may issue attaching money on current account at a bank as a debt owing to the customer, and this will be altered if the defendants' contention is correct. The decision of the learned judge was therefore right.

No reply was called for.

[BANKES L.J. We all think that a demand is necessary, but we will put our decision in writing.]

Cur. adv. vult.

March 11. BANKES L.J. read the following judgment. The material facts of this case are as follows: Before and until August 1, 1914, three persons had carried on business in Manchester in partnership under the firm name of N. Joachimson. On that date one of the partners died, and as a result the partnership was automatically dissolved. The plaintiff in the present action was one of the three partners. He is a naturalized Englishman, at all material times residing and carrying on business in England. The third partner on the outbreak of war became an alien enemy. The partnership banked with the branch of the appellant bank in London. On August 1, 1914, the amount standing to the credit of the partnership current account was something over 2300*l.* On June 5, 1919, the plaintiff commenced the present action in the name of N. Joachimson (Manchester), claiming payment of the sum standing to the credit of the account of the partnership. The action has had a chequered career during the preliminary stages, but eventually it has taken the form of

(1) [1918] 2 K. B. 848. (2) 2 M. & W. 461.

an action by the plaintiff in the name of N. Joachimson, "a firm name," claiming for the purpose of winding up the affairs of the partnership to recover the amount standing to the credit of the partnership on August 1, 1914, and asserting that the cause of action on which the plaintiff relied was one which accrued on August 1, 1914, "for money lent by the plaintiffs to the defendants as bankers, or alternatively for money had and received by the defendants for the use of the plaintiffs." To the action as thus constituted several objections were taken. With regard to the form of the action it was said that the facts did not bring it within Order XLVIIIA., r. 1, so as to allow of the action being brought in the firm name. With regard to the substance of the action it was said that on August 1, 1914, there was no accrued cause of action for the amount standing to the credit of the partnership on that date, because no demand had been made upon the defendant bank for payment on or before that date. It was also said that even if there was a cause of action on August 1, 1914, it was not a continuing cause of action at the date of the writ. There was also a set-off and counterclaim. All these points were dealt with by Roche J. in the Court below. Having regard to the view I take on the question whether there was an accrued cause of action on August 1, 1914, it is not necessary to refer to any of the other points, and I express no opinion and give no decision upon them.

The question whether there was an accrued cause of action on August 1, 1914, depends upon whether a demand upon a banker is necessary before he comes under an obligation to pay his customer the amount standing to the customer's credit on his current account. This sounds as though it was an important question. In a sense no doubt it is, but it is very rarely that the question will in practice arise. In most of the cases in which the question is likely to arise, even if a demand is necessary to complete the cause of action, a writ is a sufficient demand. It is only therefore in the unlikely case of a banker pleading the Statute of Limitations, or in a case like the present where the facts are very special, that the question becomes important. In the present case the writ was not issued till

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June 5, 1919. To succeed in the action, the plaintiffs had to prove a cause of action existing long before that date—namely, on August 1, 1914. Roche J., while recognizing that at first sight the conclusion as a matter of business seemed startling, gave judgment in favour of the plaintiffs, holding that the point had been decided in *Foley* v. *Hill* (1) and *Pott* v. *Clegg*. (2) There is no doubt that the general opinion of these decisions, as accepted in some reported cases and as expressed in the text-books, is in accordance with the view taken of them by Roche J. As illustrations I refer to *In re Tidd* (3), where counsel for the plaintiff admitted that in the case of money paid into a bank on current account the law is that the amount held by the bank is a simple debt in respect of which time runs under the Statute of Limitations without demand, and he cited as authority for the proposition *Pott* v. *Clegg* (2) and *Foley* v. *Hill* (1) in the House of Lords. North J. apparently accepted the proposition without any discussion of these cases. In Halsbury's Laws of England, vol. xix., tit. Limitation of Actions, s. 72, the same cases are cited as an authority for the proposition that " in the case of money on current account, time runs from the payment in."

It is necessary, therefore, to consider very carefully what those cases really did decide. Before proceeding to do this, it is helpful to bear in mind what the general law is with reference to payments to be made " on demand." In *Walton* v. *Mascall* (4) Parke B. states the law thus: " Now it is clear that a request for the payment of a debt is quite immaterial, unless the parties to the contract have stipulated that it shall be made; if they have not, the law requires no notice or request; but the debtor is bound to find out the creditor and pay him the debt when due." And again in *Norton* v. *Ellam* (5) the same learned judge says: " It is the same as the case of money lent payable upon request, with interest, where no demand is necessary before bringing the action. There is no obligation in law to give any notice at all; if you choose

(1) 2 H. L. C. 28.
(2) 16 M. & W. 321.
(3) [1893] 3 Ch. 155.
(4) (1844) 13 M. & W. 452, 458.
(5) 2 M. & W. 464.

to make it part of the contract that notice shall be given, you may do so. The debt which constitutes the cause of action arises instantly on the loan." In every case, therefore, where this question arises the test must be whether the parties have, or have not, agreed that an actual demand shall be a condition precedent to the existence of a present enforceable debt. In the ordinary case of banker and customer their relations depend either entirely or mainly upon an implied contract. The questions for decision in the present case must therefore be: (1.) whether the cases to which reference was made in the Court below did decide that the relation of banker and customer is such as to negative any implied condition that the making of an actual demand is a condition precedent to the bringing of an action to recover money lent to the banker by the customer on current account; and (2.) whether, if they did not so decide, such a condition should be implied. *Pott* v. *Clegg* (1) is a decision of the Court of Exchequer in 1847, and appears to have turned entirely upon the form of the pleading. The argument of the Attorney-General in showing cause against the rule was rested as a separate point upon the fact that in the pleadings the balance due from the bank to the customer was treated as an ordinary debt for money lent. In support of the rule counsel argued that as between banker and customer a special relation existed, and further that a demand was necessary as a condition precedent to the accrual of a cause of action; but both Rolfe B. and Parke B. in the course of the argument pointed out that the latter point was not open on the pleadings. The judgment of the Court was delivered by Pollock C.B., who, after saying that the majority of the Court were of opinion that money deposited in a banker's hands is equivalent to money lent, went on to say that (2), even assuming that "there are peculiar circumstances in a banking account which distinguish it from any other, yet none of those circumstances appear on these pleadings, so as to justify us in considering this case differently from what we should if it were an ordinary case of money lent." The Chief Baron then goes on to express his own doubt whether "there is not

(1) 16 M. & W. 321. (2) 16 M. & W. 328.

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a special contract between the banker and his customer as to the money deposited, which distinguishes it from the ordinary case of a loan for money." This decision does not, in my opinion, go further than recognizing that the relation of banker and customer is that of borrower and lender. It certainly does not establish the proposition that, though that is the relation, it may not be in part governed by special implied terms. *Foley* v. *Hill* was decided, in the first instance, by Lord Lyndhurst L.C. (1) The main question in the action was whether an account between banker and customer, where the former pleaded the Statute of Limitations, was the proper subject for a bill in equity. The Lord Chancellor, in giving judgment, refers to cases in which it had been decided that the relation of banker and customer was that of borrower and lender, and then proceeds (2): "Here there was a loan by Foley to the defendants, to be repaid with interest at 3 per cent.; that was the simple transaction between them, and if this were a case at law, a plea of the statute would be a sufficient answer, unless there were some special circumstances to take the case out of the statute." In the House of Lords (3) the point mainly debated was again the question whether the plaintiff's claim was a fit subject for a bill in equity. In this connection the Law Lords expressed their opinions as to the ordinary relation existing between banker and customer, and those opinions are correctly summarized in the headnote as follows: "The relation between a banker and customer, who pays money into the bank, is the ordinary relation of debtor and creditor, with a superadded obligation arising out of the custom of bankers to honour the customer's drafts; and that relation is not altered by an agreement by the banker to allow the interest on the balances in the bank." The point which is raised in the present appeal was not mentioned or discussed, either in the Court below or in the House of Lords, and in my opinion the decision cannot be treated as an exhaustive definition of all the obligations arising out of the relation between banker and customer, or as ruling out the

(1) 1 Ph. 399. (2) 1 Ph. 404.
(3) 2 H. L. C. 28.

possibility of an implied term of that relation, requiring an express demand of repayment as a condition precedent to the right to sue the banker for the amount standing to the credit of the customer's current account. The recent decision of the House of Lords in *London Joint Stock Bank* v. *Macmillan* (1), approving *Young* v. *Grote* (2), affords one striking instance of an obligation implied in the relation of banker and customer to which no reference was made in *Foley* v. *Hill*. (3) Lord Haldane points out (4) that: "Ever since this House in 1848 decided *Foley* v. *Hill* (3) it has been quite clear that the relation between a banker and the customer whose balance he keeps is under ordinary circumstances one simply of debtor and creditor. But in other judgments, and notably by a later decision of this House, *Scholfield* v. *Earl of Londesborough* (5), it was made equally clear that along with this relation and consistently with it there may subsist a second one. . . . . But the customer of a bank is under a yet more specific duty. The banker contracts to act as his mandatory and is bound to honour his cheques without any delay to the extent of the balance standing to his credit. The customer contracts reciprocally that in drawing his cheques on the banker he will draw them in such a form as will enable the banker to fulfil his obligation, and therefore in a form that is clear and free from ambiguity."

Having regard to the peculiarity of that relation there must be, I consider, quite a number of implied superadded obligations beyond the one specifically mentioned in *Foley* v. *Hill* (3) and *Pott* v. *Clegg*. (6) Unless this were so, the banker, like any ordinary debtor, must seek out his creditor and repay him his loan immediately it becomes due—that is to say, directly after the customer has paid the money into his account —and the customer, like any ordinary creditor, can demand repayment of the loan by his debtor at any time and any place. It is only necessary in the present case to consider the one question whether there is, arising out of the relation of banker

(1) [1918] A. C. 777.
(2) (1827) 4 Bing. 253.
(3) 2 H. L. C. 28.
(4) [1918] A. C. 814.
(5) [1896] A. C. 514.
(6) 16 M. & W. 321.

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and customer, the implied obligation on the part of the customer to make an actual demand for the amount standing to his credit on current account as a condition precedent to a right to sue for that amount. I cannot find that the point has ever been discussed in any reported case. For the reasons I have already given, I consider that the point has never been decided, and that it is open to this Court to decide it.

Too much reliance must not be placed upon the language of learned judges who had not the precise point before them, but it is certainly worth noticing that in *Foley* v. *Hill* in the House of Lords, the Lord Chancellor says this (1): "He (the banker) is of course answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands." Lord Brougham says (2): "I am now speaking of the common position of a banker, which consists of the common case of receiving money from his customer on condition of paying it back when asked for, or when drawn upon." In *Walker* v. *Bradford Old Bank* (3) A. L. Smith J., in speaking of the relation of banker and customer in connection with an assignment of moneys standing to a customer's credit at the bank, says: "I am of opinion that before and at the date of the assignment, and as long as the relation of customer and banker continued between the assignor and the bank, the ordinary relation of debtor and creditor existed between them (with the superadded obligation on the bank's part to honour the assignor's cheques, which is immaterial to the point under consideration), and that consequently there existed a contract on the bank's part to pay over on demand to the assignor all moneys then or thereafter standing to his credit." In *Schroeder* v. *Central Bank of London* (4) Brett J., in dealing with the suggestion that a cheque on a banker was an assignment of the moneys standing to the customer's credit at the bank, says: "This is not a case of the drawer going himself and demanding all the money in his bankers' hands, and I am myself inclined to think that it

(1) 2 H. L. C. 36.
(2) Ibid. 43.
(3) (1884) 12 Q. B. D. 511, 516.
(4) (1876) 34 L. T. 735, 736.

might be put in this way: that there was no debt on which an action against the defendants could be founded until a sum was demanded, and that when the cheque was drawn there was no debt which could be assigned."

These dicta all favour the contention of the present appellants, and they are supported by the very strong body of expert opinion which was given in evidence in the Court below as to the practice of bankers. Applying Lord Esher's test, as laid down in *Hamlyn* v. *Wood* (1), to the question whether the term contended for by the appellants must be implied in the contract between banker and customer, I have no hesitation in saying that it must. It seems to me impossible to imagine the relation between banker and customer, as it exists to-day, without the stipulation that, if the customer seeks to withdraw his loan, he must make application to the banker for it. It has been suggested that a decision to this effect would run counter to a line of authorities which have recognized and allowed garnishee proceedings in reference to amounts standing to a customer's credit on his current account, upon the ground that such amounts were debts capable of being attached. I do not agree with this suggestion. The effect of the service of a garnishee order nisi is, according to Lord Watson in *Rogers* v. *Whiteley* (2), to make the garnishee "custodier for the Court of the whole funds attached." The service of such an order is, in my opinion, a sufficient demand by operation of law, to satisfy any right a banker may have as between himself and his customer to a demand before payment of moneys standing to the credit of a current account can be enforced. As no demand for payment in the present case was made on or before August 1, 1914, it follows, in my opinion, that the plaintiffs had no accrued cause of action on that date, and the claim fails on that ground.

The appeal will be allowed with costs. The judgment must be set aside, and judgment entered for the defendants on the claim with costs. No order on the counterclaim, except that it be discontinued without costs.

(1) [1891] 2 Q. B. 488, 491. (2) [1892] A. C. 118, 122.

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WARRINGTON L.J. read the following judgment [after stating the facts and the defences raised]: The question is: In the case of money to the credit of a current account with a banker, is the existence of an actual demand an ingredient in the cause of action? In the text-books the question is answered in the negative, and it is said that the Statute of Limitations applies to a balance left untouched for six years before action: see for example Halsbury's Laws of England, tit. Bankers and Banking, s. 1196, p. 586. This view appears also to have been accepted as correct by Lord Esher M.R. and Lindley L.J. in *Atkinson* v. *Bradford Building Society* (1), and by North J. in *In re Tidd* (2), but in neither of those cases did the point arise for decision.

The cases usually cited in support of the above statement are *Foley* v. *Hill* (3), *Pott* v. *Clegg* (4), and *Foley* v. *Hill*. (5) I have mentioned them in the above order, because it is the order in which the several judgments were given, *Pott* v. *Clegg* (4) having been decided between the judgment of Lord Lyndhurst L.C. in *Foley* v. *Hill* (3) and the decision of the House of Lords in the same case. (5) In *Foley* v. *Hill* (3) the plaintiff instituted a suit in equity for an account. The defendants were bankers who had received from the plaintiff many years before suit a sum of money for which they agreed to pay 3 per cent. interest, but of this two payments only had been made, both more than six years before suit, and no interest had been credited for more than six years. The plaintiff insisted that the transaction was not one of debtor and creditor, but one of trustee and cestui que trust, and that the Statute of Limitations did not apply. The Lord Chancellor, having held that the case was one merely of a loan to the defendants to be repaid with 3 per cent. interest, said (6): "That was the simple transaction between them, and if this were a case at law, a plea of the statute would be a sufficient answer, unless there were some special circumstances to take the case out of the statute." He then held that it was also

(1) 25 Q. B. D. 377.
(2) [1893] 3 Ch. 154.
(3) 1 Ph. 399.
(4) 16 M. & W. 321, 324, 328.
(5) 2 H. L. C. 28.
(6) 1 Ph. 404, 405.

a sufficient answer in equity, and that in that case there were no special circumstances to take the case out of the statute. There was another ground relied upon by the Lord Chancellor (1) as a sufficient answer to the suit—namely, want of equity—the account being so simple as not to be the proper subject for a bill in the Court of Chancery. The Lord Chancellor did not consider whether the accepted course of business as between bankers and their customers has not introduced into their relation a modification of that of an ordinary borrower and lender. Still there is undoubtedly an expression of opinion that the debt was barred by the statute, based on the assumption that the claim was an ordinary one for money lent, but the point did not really arise for decision, inasmuch as there was ample ground without it for dismissing the bill.

The next decision in point of time was *Pott* v. *Clegg*. (2) That case has been regarded as having decided that the contract between banker and customer is the ordinary one for money lent, and that the statute runs from the receipt of the money by the banker. But when it is examined it will be found that the customer, who desired to contend, and did contend, that the contract between banker and customer was a special one under which a demand was essential to the cause of action, had not raised the point on his pleadings: see per Rolfe B., and the judgment of the Court delivered by Pollock C.B. proceeded on this footing. It is true that the majority of the Court were of opinion that money in the hands of a banker is merely money lent, but the Chief Baron expressed considerable doubt "whether there is not a special contract between the banker and his customer as to the money deposited, which distinguishes it from the ordinary case of a loan for money." This case again is not in reality a decision on the point.

In *Foley* v. *Hill*, before the House of Lords (3), the decision turned upon the question, raised and solemnly argued, whether the relation of banker and customer was not that of trustee

(1) 1 Ph. 407. (2) 16 M. & W. 321, 324, 328.
(3) 2 H. L. C. 28.

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and cestui que trust rather than that of debtor and creditor. The learned Lords were all of opinion that it was the latter, and that the Lord Chancellor was right in dismissing the bill on the ground of want of equity. Again, therefore, the point as to the true nature of the contract and of the banker's obligation did not arise for decision. Lord Cottenham L.C. however did use expressions which seem to me, at all events, to leave open the question which we have to decide. He said (1) the banker "is of course answerable for the amount"—namely, the money placed in his custody—"because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands." He in terms refused to deal with the question as to the application of the Statute of Limitations. Lord Brougham also expressly abstained from expressing any opinion upon the point, but he did, in the course of his speech, describe in terms almost identical with those used by the Lord Chancellor the nature of the banker's obligation. Lord Campbell confined his speech to the point as to want of equity, and Lord Lyndhurst added nothing material to his previous judgment in the Court of Chancery.

There is one other expression of opinion to which it is useful to refer. In *Schroeder* v. *Central Bank of London* (2), the question arose whether a cheque was an assignment of a corresponding part of the drawer's credit balance. After deciding this question in the negative for reasons not material to the present case, Brett J. said this (3): "This is not a case of the drawer going himself and demanding all the money in his bankers' hands, and I am myself inclined to think that it might be put in this way: that there was no debt on which an action against the defendants could be founded until a sum was demanded, and that when the cheque was drawn there was no debt which could be assigned, and consequently there can be no debt owing by the defendants to the plaintiffs." This is, so far as it goes,

(1) 2 H. L. C. 36.

(2) 34 L. T. 735.

(3) Ibid. 736.

the expression of an opinion in favour of the view contended for by the defendants.

In this state of the authorities it seems to me that the question we have to decide has been left open, so far as actual decision is concerned, with expressions of opinion both ways, and we must deal with it accordingly. It is, of course, well settled that in the ordinary case of money lent "the debt which constitutes the cause of action arises instantly on the loan": per Parke B. in *Norton* v. *Ellam* (1); and just before the same learned judge said: "There is no obligation in law to give any notice at all; if you choose to make it part of the contract that notice shall be given, you may do so;" and the real question is whether or not in the special case of banker and customer the obligation to give notice is part of the contract between them.

There are some points in reference to the relation of banker and customer which seem to me to indicate that such obligation is part of the contract. If the general rule above mentioned were applicable, the banker would be bound to seek out his customer and pay him, and the customer would be bound at any time and without notice to receive the amount due, but it is well settled that a banker is not at liberty to close an account in credit by payment of the credit balance without giving reasonable notice, and making provision for outstanding cheques. This restriction on a banker's liberty to discharge his debt, seems to me inconsistent with an obligation on his part to pay without demand. Of course, if the customer requires payment, he waives his right to receive notice, and then the banker's liability would immediately arise. There was evidence in the present case that bankers never in fact pay without demand, and though this by itself may not be evidence of a custom binding on both parties, it at all events shows that bankers and customers habitually act on the assumption that notice shall be given on the one side as well as on the other.

Again, there are mutual obligations on both banker and customer in reference to the payment and drawing of cheques:

(1) 2 M. & W. 464.

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London Joint Stock Bank v. *Macmillan*. (1) Cheques drawn on one branch of a bank are not payable at another. Bankers are not required to pay cheques except at the banking house and in banking hours.

All these matters seem to me to distinguish the contract between banker and customer from the ordinary case of a loan of money, and having regard to the state of the authorities I think we are at liberty to hold, and ought to hold, that a demand, either by the issue of a writ or otherwise, is an essential ingredient in the cause of action, and that without such demand no cause of action accrues. In the present case there was no demand on or before August 1, 1914. It may be suggested that the view we take is inconsistent with the operation of a garnishee order upon a banking account. I do not think so. In my opinion, the service of the order nisi would be a sufficient demand.

In my opinion, therefore, no cause of action had accrued on August 1, 1914, and the action was not maintainable. For these reasons I am of opinion that the appeal succeeds, and judgment should be entered for the defendants with costs here and below. The counterclaim will be dealt with as Bankes L.J. has said.

ATKIN L.J. read the following judgment: This case raises the question whether the customer of a bank may sue the banker for the balance standing to the credit of his current account without making a previous demand upon the banker for payment. It is unnecessary to recapitulate the circumstances which raise this issue in this case. It is sufficient to state that upon the hearing of a summons for particulars on March 16, 1920, the defendants undertook to limit their causes of action to those arising on or before August 1, 1914, and that at that date no demand for the balance had been made to the bank.

The question seems to turn upon the terms of the contract made between banker and customer in ordinary course of business when a current account is opened by the bank. It

(1) [1918] A. C. 777.

is said on the one hand that it is a simple contract of loan; it is admitted that there is added, or superadded, an obligation of the bank to honour the customer's drafts to any amount not exceeding the credit balance at any material time; but it is contended that this added obligation does not affect the main contract. The bank has borrowed the money and is under the ordinary obligation of a borrower to repay. The lender can sue for his debt whenever he pleases. I am unable to accept this contention. I think that there is only one contract made between the bank and its customer. The terms of that contract involve obligations on both sides and require careful statement. They appear upon consideration to include the following provisions. The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery. I think it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which the current account is kept. Whether he must demand it in writing it is not necessary now to determine. The result I have mentioned seems to follow from the ordinary relations of banker and customer, but it it were necessary to fall back upon the course of business and the custom of bankers, I think that it was clearly established by undisputed evidence in this case that bankers never do make a payment to a customer in respect of a current account except upon demand.

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The contention of the plaintiffs appears to me to ignore the fact that the contract between banker and customer contains special terms, and cannot in its entirety be expressed in the phrasing of an ordinary indebitatus count. A simple promise to pay upon an executed consideration creates a debt, and the creditor may sue without notice. "It is clear that a request for the payment of a debt is quite immaterial, unless the parties to the contract have stipulated that it shall be made; if they have not, the law requires no notice or request; but the debtor is bound to find out the creditor and pay him the debt when due": per Parke B. in *Walton* v. *Mascall.* (1) The question is in every case whether the parties have stipulated that a request shall be made. In the case of a note made payable on demand it is clear that the words "payable on demand" do not make a demand a term of the contract: see *Norton* v. *Ellam* (2), a decision that on a note payable with interest on demand the Statute of Limitations ran from the date of the note. Parke B. says (3): "It is the same as the case of money lent payable upon request, with interest, where no demand is necessary before bringing the action. There is no obligation in law to give any notice at all; if you choose to make it part of the contract that notice shall be given, you may do so. The debt which constitutes the cause of action arises instantly on the loan." On the other hand a note payable on demand at a particular place does contain a stipulation in the contract that demand shall be made modo et forma, and no action will lie without such a demand: see now Bills of Exchange Act, 1882, s. 87, sub-s. 1. It has been said that a demand can only be necessary where the contract is a collateral promise to pay, meaning thereby a promise such as that of a surety. This is too narrow a view, and I am inclined to think has received countenance from a misreading of the words of Alderson B. in *Norton* v. *Ellam* (3), where he adds to the judgment of Parke B.: "It must be so unless there is something to show that a demand is to be a collateral matter"; which I think means is stipulated for as qualifying

(1) 13 M. & W. 458. (2) 2 M. & W. 461.
(3) Ibid. 464.

the promise to pay. The use of the word "collateral" and its true explanation can be seen in the case of *Birks* v. *Trippet*. (1) There the principal case was an action in assumpsit, which declared that the plaintiff and defendant had submitted differences to arbitration, and that the defendant had promised the plaintiff that if the defendant did not perform the award he would pay 40*l*. if he should be thereunto requested. Saunders, of counsel for the defendant, took objection to the declaration "that the plaintiff (in his declaration) had not laid any request of the penalty of 40*l*.," and he argued that there was a difference between a mere duty and a collateral sum: "For where a mere duty is promised to be paid upon request, as if in consideration of all moneys lent to the defendant, he promised to pay them again on request, no actual request is necessary, but the bringing of the action is a sufficient request. But otherwise it is on a promise to pay a collateral sum on request, for there an actual request ought to be made before action brought. And so was the opinion of the whole Court. And thereupon judgment was given for the defendant." And Serjeant Williams, in his note, cites a number of cases and then says: "For the request is parcel of the contract, and must be proved; and no action arises until a request be made."

The question appears to me to be in every case, did the parties in fact intend to make the demand a term of the contract? If they did, effect will be given to their contract, whether it be a direct promise to pay or a collateral promise, though in seeking to ascertain their intention the nature of the contract may be material. In the case of such a contract as this, if I have correctly stated the manifold terms of it, it appears to me that the parties must have intended that the money handed to the banker is only payable after a demand. The nature of the contract negatives the duty of the debtor to find out his creditor and pay him his debt. If such a duty existed and were performed, the creditor might be ruined by reason of outstanding cheques being dishonoured. Moreover, payment can only be due, as it appears to me, at the branch

(1) (1666) 1 Wms. Saund., ed. 1871, p. 33.

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where the account is kept, and where the precise liabilities are known. And if this is so, I apprehend that demand at the place where alone the money is payable must be necessary. A decision to the contrary would subvert banking business. I am glad to think that, so far as I can ascertain, the decisions in the American Courts are uniformly to the same effect as our present judgment.

The practical bearing of this decision is on the question of the Statute of Limitations. Since the case of *Pott* v. *Clegg* (1) in 1847 it has been laid down in text-books that, in the case of a current account, the statute runs from the time of the money being deposited with the banker. But if that case is looked at, it is plain that it was decided upon the pleadings, the sum in question being claimed to be set off for money lent by the defendant's testator to the plaintiff's predecessor in title. It is stated that the majority of the Court were of opinion that money in the hands of the banker is merely money lent, with the superadded obligation that it is to be paid when called for by the draft of the customer. The Lord Chief Baron was of opinion that it was a question for the jury whether there is not a special contract between the banker and his customer as to the money deposited, which distinguishes it from the ordinary case of a loan for money. The Lord Chief Baron delivered the judgment of the Court, and it is plain from his language that he could not have done so had not the decision been confined to the pleading point. The only other direct authority is the decision of Lord Lyndhurst L.C. in *Foley* v. *Hill*. (2) The suit was for an account, and I am not certain that in dealing with the Statute of Limitations Lord Lyndhurst was not dealing with those words in the statute that deal with actions of account. The right to such an action may well accrue before a debt becomes payable. But on the assumption that the Lord Chancellor decided that the statute had run against a claim in debt or assumpsit, yet inasmuch as that decision was taken to the House of Lords (3) and affirmed there by all the Lords present, including Lord

(1) 16 M. & W. 321. (2) 1 Ph. 399.
(3) 2 H. L. C. 28.

Lyndhurst himself, upon one only of the grounds relied upon in the judgment below, the point as to the Statute of Limitations being expressly reserved, I do not think that we are bound to treat the whole of Lord Lyndhurst's judgment as binding upon us. It may be noted that the decision of the Court of Exchequer in *Pott* v. *Clegg* (1) had been given between the dates of the decision of Lord Lyndhurst in *Foley* v. *Hill* (2) and the hearing in the House of Lords. (3) The decision in the latter case in the House of Lords is confined to the point that the banker is debtor to his customer and not trustee. I do not think it safe to rely upon the language used by the Lord Chancellor and Lord Brougham on the subject of demand and request, though the words used tend to support the contention of the present appellants.

The result of this decision will be that for the future bankers may have to face legal claims for balances on accounts that have remained dormant for more than six years. But seeing that bankers have not been in the habit as a matter of business of setting up the Statute of Limitations against their customers or their legal representatives, I do not suppose that such a change in what was supposed to be the law will have much practical effect. It was suggested in argument that the effect of our decision will be to alter the facilities given to an execution creditor to attach his debtor's bank account in garnishee proceedings. This appears to be a mistake. The provisions of Order XLV. apply to debts owing or accruing from the garnishee, and this expression includes debts to which the judgment debtor is entitled though they are not presently payable: see the decision of the Court of Appeal in *O'Driscoll* v. *Manchester Insurance Committee.* (4) The service of the order nisi binds the debt in the hands of the garnishee—that is, creates a charge in favour of the judgment creditor. If the bank disputes that the amount is payable, there is ample power to provide for a demand being made before an order for payment is made. Possibly the order nisi in itself operates as such a demand.

(1) 16 M. & W. 321.
(2) 1 Ph. 399.
(3) 2 H. L. C. 28.
(4) [1915] 3 K. B. 499.

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Finally it is perhaps unnecessary to say that the necessity for a demand may be got rid of by special contract or by waiver. A repudiation by a bank of the customer's right to be paid any particular sum would no doubt be a waiver of any demand in respect of such sum.

For these reasons, I am of opinion that the appeal should be allowed, and that judgment should be entered for the defendants on the claim with costs.

Appeal allowed.

Solicitors for plaintiffs: *Rawle, Johnstone & Co., for Addleshaw, Sons & Latham, Manchester.*

Solicitors for defendants: *Michael Abrahams, Sons & Co.*

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April 6.

[IN THE COURT OF APPEAL.]

SHEPPARD *v.* MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF GLOSSOP.

[1919. S. 1330.]

[MANCHESTER DISTRICT REGISTRY.]

[1919. S. 1340.]

Local Government—Street-lighting—Dangerous retaining Wall—Accident to Wayfarer—Duties and Powers of Local Authority—Negligence—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 161.

A certain street was vested in an urban authority under the Public Health Act, 1875. It declined sharply and was bounded on one side by a retaining wall about 5 ft. high separating it from land at a higher level. The land and the retaining wall were the property of a private owner. In pursuance of s. 161 of the Public Health Act the authority placed a lamp on the retaining wall, but extinguished it every night soon after 9 o'clock in accordance with a resolution passed on December 12, 1918. On December 25, 1918, at 11.30 P.M. the plaintiff intending to go home by the street missed his way without negligence, strayed on to the private land, and fell over the retaining wall into the street and was injured.

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In an action against the urban authority for negligence in the performance of an alleged duty to light the street sufficiently :—

Held, that s. 161 of the Public Health Act, 1875, confers upon urban authorities a discretion, but imposes on them no obligation to light the streets in their districts; consequently that the defendants who had begun were not bound to continue to light the street; and that having done nothing to make the street dangerous they were under no obligation, whether by lighting or otherwise, to give warning of danger.

Held, therefore, that the defendants were not liable.

Dictum of Lord Esher M.R. in *Lamley* v. *East Retford Corporation* (1891) 55 J. P. 133 disapproved.

Dictum of Lush J. in *McClelland* v. *Manchester Corporation* [1912] 1 K. B. 118, 133 questioned.

Judgment of Greer J. reversed.

APPEAL from the judgment of Greer J. in an action tried before the learned judge without a jury at Manchester.

The plaintiff, a teamster and carter, brought an action against the defendants, who were the highway authority and had undertaken to supply gas for lighting the streets of the borough of Glossop under s. 161 of the Public Health Act, 1875. (1) He alleged that the defendants had undertaken to light a highway known as Castle Hill and another highway known as Dun Lane leading from Castle Hill into Church Street, all of which were within their district, and that he had suffered injury through their negligence in the performance of the duty so undertaken. In particular he alleged that the defendants owned a lamp on a path or road known as Old Quarry Road and that they had failed and neglected to keep

(1) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 161 : " Any urban authority may contract with any person for the supply of gas, or other means of lighting the streets markets and public buildings in their district, and may provide such lamps lamp posts and other materials and apparatus as they may think necessary for lighting the same.

" Where there is not any company or person (other than the urban authority) authorised by or in pursuance of any Act of Parliament, or any order confirmed by Parliament, to supply gas for public and private purposes, supplying gas within any part of the district of such authority, such authority may themselves undertake to supply gas for such purposes or any of them throughout the whole or any part of their district; and if there is any such company or person so supplying gas, but the limits of supply of such company or person include part only of the district, then the urban authority may themselves undertake to supply gas throughout any part of the district not included within such limits of supply. . . . ."

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it alight, as the result of which negligence he fell over a retaining wall between Old Quarry Road and Dun Lane and was seriously injured.

The highway known as Castle Hill at its eastern end leads into Dun Lane, which bears towards the right and forms an angle with Old Quarry Road which bears towards the left. Old Quarry Road is on the same level as Castle Hill; Dun Lane descends sharply. Castle Hill and Dun Lane are highways repairable by the defendants. Old Quarry Road is a public highway for foot passengers and vehicles over land belonging to Lord Howard of Glossop which is separated from Dun Lane by a retaining wall about 5 ft. high, the property of the same landowner. The plaintiff alleged that Old Quarry Road was repairable by the inhabitants at large, but he failed to prove this, and the learned judge held that there was no evidence that it had been adopted or had become repairable by the defendants. Above the retaining wall, at about 20 ft. from the junction of the three roads, was a lamp. The roads, the retaining wall, and the lamp had been in the same position for forty-three years. The place was reasonably safe for foot passengers during daylight and at night when the lamp was lit, but on a dark night when the lamp was not lit it was dangerous.

By a resolution of December 12, 1918, the Lighting Committee of the defendants resolved that the lights in the borough of Glossop should be put out as soon as possible after 9 P.M., and the lamp in Old Quarry Road was extinguished each night at some time between 9 and 9.30 P.M. by the defendants' lamplighter in obedience to their instructions and in accordance with the resolution.

At 11.30 on the night of December 25, 1918, the plaintiff left the house of a friend named Goddard, who lived at the end of Castle Hill near the junction of Old Quarry Road and Dun Lane, intending to go home by Dun Lane. He came out of a lighted house into the night, which was dark although clear and frosty. Then his proper course would have been to pass 20 ft. or so to the right of the lamp, as he would thus have avoided Old Quarry Road and the

retaining wall beyond it, and would have reached the entrance of Dun Lane without mishap. But instead of doing this, without negligence on his part, he went to the left of the lamp and before he discovered his mistake fell from the top of the retaining wall into Dun Lane. He fractured his skull and suffered other serious injuries. The learned judge found that the accident would not have happened if the lamp had been lighted. He assessed the plaintiff's damages at 279*l.* 10*s.* and gave judgment for him for that amount.

The defendants appealed.

Barrington-Ward K.C. and *Pritt* for the appellants. The learned judge ought to have given judgment for the appellants. He based his judgment upon two dicta, one by Lord Esher M.R. in *Lamley* v. *East Retford Corporation* (1) that "the Corporation had undertaken to light the town, and they were the owners of the gas works. They must light the town reasonably and sufficiently"; and the second by Lord Blackburn in *Geddis* v. *Bann Reservoir Proprietors* (2) that "an action does lie for doing that which the Legislature has authorized, if it be done negligently. And . . . . if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, 'negligence' not to make such reasonable exercise of their powers." Lord Esher's dictum was unnecessary for the decision, which can be supported on other grounds. If it means that local authorities, which need not light their districts at all, are liable if they light them insufficiently, it is unsound and ought to be overruled. Lord Blackburn's dictum has been misapplied. No action lies for doing that which the Legislature has authorized, if it be done without negligence. If the Legislature authorize a body to light or abstain from lighting a district, no action will lie against the body for abstaining from lighting; because the Legislature has authorized the abstention.

The numerous cases upon the liability of public authorities

(1) 55 J. P. 133. (2) (1878) 3 App. Cas. 430, 456.

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for not lighting streets fall into two distinct classes : (1.) those where the powers and duties of the public body are regulated by s. 130 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120) ; (2.) those where the powers and duties are regulated by s. 161 of the Public Health Act, 1875. A sharp distinction must be drawn between these two classes. The earlier Act imposes a duty ; the later Act confers a discretion. Cases under the earlier Act are *Young* v. *St. Mary's Islington* (*Vestry*) (1), *Baldock* v. *Westminster City Council* (2), and *Carpenter* v. *Finsbury Borough Council* (3) ; they have no bearing on the present case.

Where the power to light is discretionary, as it is under s. 161 of the Public Health Act, 1875, no action lies for merely exercising the discretion in one way, though it causes damage which would not have been caused if the discretion had been exercised otherwise : *Harris* v. *Baker* (4) ; *Mellor* v. *Heywood Corporation* (5) ; *Young* v. *St. Mary's Islington* (*Vestry*). (1)

Where the public authority have themselves created a danger they may be liable if they fail to light it by night ; but this is not for the breach of any duty to light, but for the breach of a duty to take reasonable care to prevent damage from the danger they themselves created. This is the real ground of the decisions in *Lamley* v. *East Retford Corporation* (6), *McClelland* v. *Manchester Corporation* (7) and *Morrison* v. *Sheffield Corporation.* (8)

[SCRUTTON L.J. referred to *Boynton* v. *Ancholme Drainage Commissioners.* (9)]

The appellants have merely exercised their discretion in not lighting Dun Lane ; they have done nothing to create any danger that may exist, and therefore they are not liable.

[*Cowley* v. *Newmarket Local Board* (10) and *Great Central Ry. Co.* v. *Hewlett* (11) were also cited.]

Eastham for the respondent. Assuming that the appellants

(1) (1896) 60 J. P. 821.
(2) (1918) 120 L. T. 470.
(3) [1920] 2 K. B. 195.
(4) (1815) 4 M. & S. 27.
(5) (1884) 48 J. P. 148.
(6) 55 J. P. 133.
(7) [1912] 1 K. B. 118.
(8) [1917] 2 K. B. 866.
(9) [1921] 2 K. B. 213.
(10) [1892] A. C. 345.
(11) [1916] 2 A. C. 511.

are under no duty but are merely empowered to light their district; and that if they had never lighted Dun Lane the respondent would have had no cause of action; yet having taken it upon them to light this place they were bound to light it adequately. This view is supported not only by the decision of Lord Esher M.R. in *Lamley* v. *East Retford Corporation* (1) but by that of Lush J. in *McClelland* v. *Manchester Corporation* (2), where that learned judge said: "Mr. Langdon contended that if the defendants undertook to light and did light a street which they knew to be dangerous they would be liable for an accident caused by insufficient and improper lighting, and he cited the case of *Lamley* v. *East Retford Corporation* (1) as an authority for his contention. I think that the principle of that case applies, and that as the defendants negligently and inadequately lighted the street, having regard to its condition, they are liable on that ground." This case comes well within those words. It is also within the words of Lord Blackburn in *Geddis* v. *Bann Reservoir Proprietors* (3) on which Greer J. relied in the Court below. If the appellants had exercised their powers reasonably they would have lighted Dun Lane and thereby prevented the damage. If so, it was negligence not to make this reasonable exercise of their powers.

Counsel for the appellants were not called upon to reply.

BANKES L.J. In this case the respondent alleged that the appellants, the Glossop Corporation, were liable to him in damages for personal injuries sustained by him through their failure to keep a lamp alight at a dangerous spot within their area. Greer J. has decided the case in the respondent's favour and awarded him damages, founding himself upon the decision in *Lamley* v. *East Retford Corporation*. (1) It is therefore necessary to consider whether that case was in all points rightly decided and whether its bearing upon the present case has been rightly appreciated.

The facts are not in dispute. Within the appellants'

(1) 55 J. P. 133. (2) [1912] 1 K. B. 118, 133.
(3) 3 App. Cas. 430, 456.

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district there is a highway, a street, called Dun Lane. At this particular part of the district the ground is upon a considerable incline. In order to form Dun Lane a cutting must have been made, and on the left-hand side of Dun Lane as one goes from Castle Hill a retaining wall has been built. At the top of this wall there is unenclosed ground lying open to a road named Old Quarry Road. Any one coming down Castle Hill towards Dun Lane in the dark would be very likely to enter upon this unenclosed ground above Dun Lane, and would then be in great danger of falling over the retaining wall into Dun Lane. No doubt the place was dangerous; but it was not made dangerous by the appellants. It came into existence as a dangerous place when Dun Lane was originally carved out of the adjoining ground. The respondent, who was visiting a friend in the immediate neighbourhood of this place on Christmas night, left his friend's house intending to make for Dun Lane, but unfortunately instead of striking the entrance to Dun Lane he went upon the unenclosed ground above Dun Lane, fell over the retaining wall, and was seriously injured. In respect of these injuries he brought his action.

There is close to the spot where he fell a lamp erected by the respondents under their statutory powers and supplied with gas by them and lighted and put out by their servants. On Christmas night, 1918, it was extinguished soon after 9 o'clock in obedience to a general order issued from motives of economy, and when the respondent left his friend's house for Dun Lane the place was in darkness. Mr. Eastham for the respondent has laid great stress upon the finding of the learned judge that if the lamp had been alight the accident would not have happened.

The statutory duty of the respondents in regard to this lamp is admittedly to be found in s. 161 of the Public Health Act, 1875, and so the true effect of that section is the first question. In my opinion it confers on the respondents authority, but imposes on them no obligation, to light their district. It leaves it to their discretion whether they will light the district or any part of it, and how long the lamps

shall be kept lit in any portion of the district which they elect to light. There is a strong contrast between the discretion given to an urban authority by this section and the obligation imposed by s. 130 of the Metropolis Management Act, 1855, upon local authorities in the metropolis to light the streets within their districts.

If my view of s. 161 is correct, the next question is how far the dictum of Lord Esher M.R. in *Lamley* v. *East Retford Corporation* (1), upon which Greer J. is said to have based his judgment for the respondent, is justified. The defendants in that case had placed a post in the middle of a public highway, and the question was whether they were liable for failing to light that portion of their district. Their liability arose not from a mere omission to light their district efficiently, but from their act in placing in the highway a post which unless lighted was a danger to passers by. Therefore it was not material to express an opinion upon any general obligation to light their district. Undoubtedly in Lord Esher's judgment this passage does occur: "The corporation had undertaken to light the town, and they were the owners of the gas works. They must light the town reasonably and sufficiently." If the Master of the Rolls is correctly reported, and if he intended to lay it down as a matter of law that under the Public Health Act, 1875, the local authority was under an obligation to light the whole of the town reasonably and sufficiently, I am not able to agree with that view. It is true that the decision was a decision of the Court of Appeal, but the case is not fully reported. The judgments of Bowen and Fry L.JJ. are not given, and if Lord Esher used the words ascribed to him, the dictum was not necessary for the decision of the case. I come to the conclusion therefore that there is really no authority to support the proposition that s. 161 of the Public Health Act, 1875, imposes any obligation on a local authority to light any part of their district.

We have been referred to a number of decisions of which some bear directly and some indirectly upon this point. In each case where the only cause of action alleged was an

(1) 55 J. P. 133.

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omission by a local authority under the Public Health Act to exercise to the full their powers of lighting a district, the Courts have decided against the cause of action. Without going through these cases one by one I would mention *Harris* v. *Baker* (1), *Mellor* v. *Heywood Corporation* (2) and *Young* v. *St. Mary's Islington* (*Vestry*) (3) as examples of the rule I have just stated. In each of those cases it was held that the plaintiff had failed to establish any liability on the part of the defendants for a mere failure to light a particular part of their district. And I think it will be found that wherever a plaintiff has succeeded in establishing a liability it has been not for merely omitting to light a part of the district but for making it dangerous unless it is sufficiently lighted, and then leaving it unlighted. *Lamley* v. *East Retford Corporation* (4) and *McClelland* v. *Manchester Corporation* (5) are illustrations of this principle. The East Retford Corporation had erected a post in the middle of a footpath. The post was a serious danger at night; there was therefore a clear duty upon them by some means or other, whether by means of a watchman, or by a light placed on or near it, or otherwise to warn passers-by that the post was there and must be avoided. They were held liable because they had placed that obstruction in the highway which was a source of danger unless lighted. *McClelland's Case* (5) was decided by Lush J. on the same principle, although I think the headnote to the report does not sufficiently explain the decision. The defendants in that case had taken over an existing highway at the end of which there was a kind of ravine. They had made up the road and had placed lights in it. There was apparently beyond the ravine another street, and they had made up this street also and placed lights in it. The jury came to the conclusion that by so making up the two streets with the ravine intersecting them the defendants had in effect set a trap for passers-by, and that by lighting the streets at night they had made the trap more dangerous because a passenger

(1) 4 M. & S. 27.
(2) 48 J. P. 148.
(3) 60 J. P. 821.
(4) 55 J. P. 133.
(5) [1912] 1 K. B. 118.

seeing a continuous row of lights would assume that there was no interruption of the highway. In answer to questions put by the learned judge the jury found that the road as made up and constructed was a danger to persons lawfully using it; that the ravine which was unfenced was a hidden trap to persons using the road; that the defendants did not take proper care to warn the public of the existence of the danger, and that the public were invited by what the defendants had done to pass along the whole of the road as being a proper highway. Upon these findings the learned judge said (1): "The defendants, therefore, having exercised their powers, as the jury thought, negligently in such a way as to leave a hidden trap for persons who went along that road at night, exposing them to unnecessary and avoidable danger, are liable to the plaintiff, who suffered damage by reason of this negligence." So far he treated the case as an example of the principle of *Lamley* v. *East Retford Corporation*. (2) But a point was also raised upon the alleged insufficiency of light near the edge of the ravine. Upon that point Lush J. said (3): "Mr. Langdon contended that if the defendants undertook to light and did light a street which they knew to be dangerous they would be liable for an accident caused by insufficient and improper lighting, and he cited the case of *Lamley* v. *East Retford Corporation* (2) as an authority for his contention. I think that the principle of that case applies, and that as the defendants negligently and inadequately lighted the street, having regard to its condition, they are liable on that ground." In other words, the learned judge says, Having themselves made the road dangerous it was then the duty of the defendants to light it sufficiently. This does not quite clearly appear from the headnote to the report, which is "*Held* that the effect of the findings of the jury was that the defendants in taking over and making up the street and leaving it in a dangerous condition had been guilty of misfeasance, and also that they had acted negligently in the performance of their statutory duties with regard to

(1) [1912] 1 K. B. 131. (2) 55 J. P. 133.
(3) [1912] 1 K. B. 133.

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maintaining and lighting the street, and that the plaintiff was, therefore, entitled to judgment." The latter part beginning with the words "and also" might give the impression that Lush J. had held that the mere neglect to light the street was a sufficient cause of action. I do not think that is the effect of the judgment.

The only other case I wish to refer to, *Morrison* v. *Sheffield Corporation* (1), clearly points out the distinction I have been attempting to draw. The plaintiff brought his action for personal injuries suffered by him from the negligence of the defendants in lighting insufficiently certain protecting fences which they had placed round trees planted by themselves. Lord Reading C.J. explained that the cause of action was not for merely omitting to light sufficiently, but was for having placed fences which in themselves were dangerous unless lighted. He said (2): "I have come to the conclusion that the duty was continuing; that the degree of care required was not exhausted by erecting the guards so as to be reasonably safe for the protection of the public at the time of their erection; and that the duty continued to so keep them as not to be dangerous to the public using the highway." And Pickford L.J. said (3): "It is said that our decision will involve a hardship on local authorities and will impose on them an obligation to guard or to paint every post and kerb, but in truth it only imposes an obligation to take reasonable care that what they have put in the roadway shall not become a nuisance and a danger under altered conditions."

Mr. Eastham contended that the particular facts of this case made it independent of those authorities. He relied partly upon the dictum of Lord Esher M.R. to which I have referred, and partly on Lord Blackburn's dictum in *Geddis* v. *Bann Reservoir Proprietors*. (4) Lord Blackburn there laid down a rule and then applied it to the case before him. He said: "For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the Legislature has authorized, if it be done without

(1) [1917] 2 K. B. 866.
(2) [1917] 2 K. B. 871.
(3) [1917] 2 K. B. 872.
(4) 3 App. Cas. 430, 455.

negligence, although it does occasion damage to any one; but an action does lie for doing that which the Legislature has authorized, if it be done negligently." That is the rule. Then follows the application of the rule: "And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, 'negligence' not to make such reasonable exercise of their powers." That which the Legislature has authorized in this case is the lighting of this particular district. If in lighting the district they act negligently, if for instance they should erect a lamp post and leave it unprotected in the middle of a highway or so close by the highway as to be a danger to persons passing along unless it was properly protected, or allow their gas to escape into some one's house, those would be negligent acts in the course of doing that which the Legislature has authorized. But in my opinion Lord Blackburn's rule is not applicable when it is left to the discretion of a local authority how long they shall keep the lamps alight in their district, whether they shall remove an existing lamp post, and whether they shall cease to supply gas to some lamps and continue to supply it to others. This is not a case of a statutory power, like a power to make a reservoir and maintain a sufficient supply of water therein, negligently exercised; the appellants have merely exercised the discretion vested in them by the Legislature. They were under no obligation to place a lamp post at this particular spot; having placed it there they were not bound to keep it there; and if they kept it there they were not bound to supply it with gas, and are not to be made liable for merely extinguishing the light at any particular hour. For these reasons I think the appeal should be allowed and judgment entered for the appellants.

SCRUTTON L.J. I am of the same opinion. First of all it is to be noticed that this is not a case where a road has been made up with a sudden drop into adjoining land below, so that the local authority might be bound to take reasonable

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means to protect persons using the road from falling over a precipice or into a pit. In this case the respondent was walking where he had no business to be, on land above Dun Lane. Next, it is to be observed that the appellants did not make this road, or the retaining wall, or the drop from the one to the other. They took over the road. They have not put anything into the highway which is a danger. The danger was there before they took it over. They have put a lamp on the top of the retaining wall, and from motives of economy they decided that lamps should be turned out at 9 o'clock in the evening. The respondent on Christmas night at about half-past eleven, coming from a house on Castle Hill and meaning to go down Dun Lane, found his way on to the waste land. Apparently he had seen the lamp post, but forgot where it was and did not use it as a guide. He failed to recognize the danger and fell some four or five feet into Dun Lane and was seriously injured. He brought an action against the appellants and Greer J. has given judgment in his favour.

It is necessary to say that this is not a case under the Metropolis Management Act, 1855, and nothing I am about to say has any application to local authorities exercising the powers of that Act, which imposes a standard of liability entirely different from that imposed by s. 161 of the Public Health Act, 1875.

Counsel for the respondent began by admitting that if the appellants had chosen not to light the borough of Glossop at all, and to have no lamps, they would in this case have been under no liability whatever. It is clear that if they had placed in a highway an obstruction which might cause damage in the dark to the public using the highway, then they would be required either by lighting or other proper warning to give notice of the obstruction. Or if they had constructed the highway and made it so that it ran along the edge of a precipice, there might be a duty upon them to give to passengers notice of the danger by warning or lighting or some other means. But what obligation is there to give warning to persons on private land that there is a highway into which they may fall ?

Mr. Eastham admitted that the appellants were not bound in the first instance to light the borough at all. Then if they have once begun to light, are they bound to continue? Mr. Eastham answered, Yes. I am unable to agree. It is left to their discretion to light or not to light; therefore they need not light at all; if for a time they light they may discontinue either wholly or partially in point of time or in point of space, and the mere discontinuance is no breach of duty. That is, of course, subject to this; that if they place an obstruction in the highway they must by lighting or warning, or by watchmen or fences or other reasonable means, guard against the danger they have themselves created.

Great reliance was placed on the words of Lord Blackburn in *Geddis* v. *Bann Reservoir Proprietors* (1): "An action does lie for doing that which the Legislature has authorized, if it be done negligently." The argument, which here followed the letter rather than the spirit of that passage, was this: The appellants were doing that which the Legislature authorized —namely, lighting; they were doing that negligently when they turned out a light in a dangerous place. That argument takes Lord Blackburn's words as meaning, not only does an action lie for doing that which the Legislature has authorized if the doing is negligent; an action also lies for abstaining from doing that which the Legislature has authorized, if the abstaining is negligent. But it is not negligent to abstain from doing a thing unless there is some duty to do it. The argument in truth assumes a duty upon the appellants to light. If there is no duty to light there is no negligence in abstaining from lighting. Lord Blackburn's words are addressed to negligence in the direct operation of the powers conferred and undertaken; for instance if the appellants chose to light by electricity and laid defective wires near to the main gas pipes in their district and so caused an explosion, that would be a negligent exercise of their powers; or if they placed a refuge in a crowded street and omitted to light it properly, that might be doing negligently that which the Legislature authorized. But it is going far beyond Lord Blackburn's dictum to say that because,

(1) 3 App. Cas. 430, 456.

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when an option is given by statute to an authority to do or not to do a thing and it elects to do the thing and does it negligently, it is liable, therefore it is liable if it elects not to do the thing, which by the statute it is not bound to do at all.

The authorities are unsatisfactory. In *Harris* v. *Baker* (1) certain trustees who had power to light and maintain a road had left heaps about in the road and had not lighted them. Lord Ellenborough held that they were not liable. I should have thought myself that they had placed a danger in the road and that the question was whether they had taken reasonable precautions to guard passers-by against it. *Mellor* v. *Heywood Corporation* (2) seems to be open to the same criticism. The defendant, the mayor of Heywood, put up a lamp-post in the road. A gentleman who was coming to dine with the defendant drove into the lamp-post because it was not lighted. It was held that the defendant was not liable. I should have thought there was something put into the road which ought to have been properly guarded, and that the decision might very well have been the other way. The case is so shortly reported that it is probably not safe to rely upon it. Then comes the case on which the learned judge relied, the *East Retford Case.* (3) The report omits the judgment of the junior members of the Court, and I venture to assert that Lord Esher M.R. said more than is contained in the twenty lines attributed to him. The principle I have stated forms one of the grounds of the decision. A post had been placed in a public footway; it had been there for six weeks; no warning was given of its presence, and a man in the dark lawfully using the footway came into collision with it and was injured. That was amply sufficient ground for the decision. The powers and duties of the local authority were those conferred and imposed by the Public Health Act. Lord Esher is reported to have said: "The corporation had undertaken to light the town, and they were the owners of the gas works. They must light the town reasonably and sufficiently." Admittedly they were not bound to light

(1) 4 M. & S. 27. (2) 48 J. P. 148.
(3) 55 J. P. 133.

it at all; and unless it can be said that having lit part of the town they were bound to light every part of it, it is difficult to understand what Lord Esher can have meant by those words. I am unable to agree with them. They seem to me to be inconsistent with the true meaning of s. 161 and in my opinion they are not law. *Young* v. *St. Mary's Islington (Vestry)* (1) was under the Metropolis Management Act, 1855, and not under the Public Health Act, 1875, and therefore I say nothing about it. The next case in point of time is a decision of Lush J.: *McClelland* v. *Manchester Corporation.* (2) The exact terms of the local Act there in question are not given, but they are said to be similar to those of the Public Health Act and I take the two enactments to be the same in all that is material. I have considerable difficulty in following parts of that case. A road had been dedicated to the public for fourteen years. It stopped abruptly at the edge of a ravine and was in that respect dangerous. The Manchester Corporation then took it over and made it up. So far I fail to see how they can be said to have created a danger which had been there for fourteen years; but the jury being asked the question: "Was the road as made up and constructed a danger to persons lawfully using it?" answered "Yes." Some little time afterwards, however, the corporation did something additional which converted the danger into a trap. On the other side of the ravine, in the same line with the road already mentioned, was another road. They placed lights in the two roads so that, to a person coming into the first road at night and not knowing the true state of things, it looked as if the two roads were one continuous road with lights at equal distances apart. The driver of a motor-car turned into the first road and, seeing what appeared to be a continuous road, drove on and precipitated himself and the plaintiff into the ravine. Those facts seem to me to afford sufficient ground for the decision. But the learned judge in his judgment said (3): "Mr. Langdon contended that if the defendants undertook to light and did light a street

(1) 60 J. P. 821. (2) [1912] 1 K. B. 118.
(3) [1912] 1 K. B. 133.

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which they knew to be dangerous they would be liable for an accident caused by insufficient and improper lighting, and he cited the case of *Lamley* v. *East Retford Corporation* (1) as an authority for his contention. I think that the principle of that case applies, and that as the defendants negligently and inadequately lighted the street, having regard to its condition, they are liable on that ground." In so far as the facts in that case show that the corporation had done something which made a danger, I can follow the decision; but I still have a difficulty in seeing what they had done to contribute to the danger except the lighting of the street on the other side of the ravine, which the learned judge was not considering in that part of his judgment. If he means this: Although the defendants did not make the danger they have a duty to light adequately a street which they take over in which there is a danger, then it seems to me this passage in the judgment is open to the same criticism as the passage from Lord Esher's judgment in the *East Retford Corporation's Case* (1) and I am not prepared to agree with it.

Great Central Ry. Co. v. *Hewlett* (2) decides no more than this, that where the Legislature expressly authorizes the existence of a particular obstacle in a highway it does not impose any obligation to light it. *Morrison* v. *Sheffield Corporation* (3) is another case of creating a danger in a highway. The corporation with a view to improving the amenities of Sheffield planted trees in the streets. They then placed round the trees railings with spiked posts bent outwards to prevent boys from climbing. During the period of the Zeppelin raids on dark nights, when the lights in Sheffield were put out in pursuance of powers given by the Defence of the Realm Regulations, the plaintiff walked into the obstruction and damaged his eye. There the local authority had placed the danger in the street with no sufficient guard. *Baldock* v. *Westminster City Council* (4) is a case under the Metropolis Management Act, 1855, and one moreover in which the local authority placed a refuge in the street without

(1) 55 J. P. 133.
(2) [1916] 2 A. C. 511.
(3) [1917] 2 K. B. 866.
(4) 120 L. T. 470.

sufficient warning. *Carpenter* v. *Finsbury Borough Council* (1) is also a case of a metropolitan authority and in no wise conflicts with the principle I have laid down. I think that Greer J. when he tried the present case must have had in mind *Boynton* v. *Ancholme Drainage Commissioners.* (2) There a statute gave the commissioners a discretion to make such drains as they should think necessary and convenient, but required that the drains that were made should be maintained and kept in repair. They made a drain but allowed it to become choked, so that the neighbouring land was flooded. The same learned judge held that the statute gave the commissioners a discretion not only to make but also to maintain drains, and that no action would lie against them for not maintaining a drain they were not bound to make or maintain. This Court declined to decide whether an action would lie for not making a drain, but held that the statute imposed a duty to maintain drains that had been made and that an action would lie for not maintaining them. That decision had not been reported in the Law Reports when the learned judge decided this case. If it had been before him he would have seen that the principle of *Geddis* v. *Bann Reservoir Proprietors* (3), as there explained, did not apply to this case. As it was, he may have been misled into thinking that the decision went further than in truth it did.

The authorities, as I have said, are not at all satisfactory. In my view the principle is this: Under s. 161 of the Public Health Act, 1875, whether or not local authorities are under any obligation to light—it is left to their discretion—they are under no obligation to continue lighting either in whole or in part; the power given them is discretionary. If they do light they will be liable in damages for negligence in lighting; negligence in allowing gas or electricity to escape; negligence in putting posts in a highway without warning, and negligence in placing traps and dangers in the streets and not lighting them at night. But they are not liable merely because in the exercise of their discretion they do

(1) [1920] 2 K. B. 195. (2) [1921] 2 K. B. 213.
(3) 3 App. Cas. 430.

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not light, or because they discontinue lighting, dangers which they have not themselves created. For these reasons I agree that the appeal should be allowed.

ATKIN L.J. I agree, and should add nothing if we were not differing from the learned judge, for whose opinion I have much respect.

If a local authority having statutory powers decides to exercise those powers, it is under a duty to persons interested to take reasonable care not to cause damage, so far as the avoidance of damage is consistent with the exercise of the statutory powers. But it is under no legal duty to act reasonably in deciding whether it shall exercise its statutory powers or not, or in deciding to what extent, over what particular area, or for what particular time, it shall exercise its powers. If it decides to light any area, its lamps and appliances must be placed and maintained with reasonable care so as to avoid danger to wayfarers or owners or occupiers of adjoining property. If gas or electricity is conducted to the lamps, care must be taken to prevent the gas or electricity from escaping so as to cause damage. There is no duty to exercise the power of lighting at all. Nor, if the local authority do light, are they obliged to light the whole of their district or any particular part of it. They are under no duty to light all dangerous places, or any dangerous place; and if they do light a dangerous place for part of the night, they are not bound to light it during the whole night. In this particular case the local authority did not cause the danger; it was already in existence; there was a steep place adjoining the highway when the local authority took it over. The real complaint of the plaintiff is not that they caused the danger, but that, the danger being there, if they had lighted it he would have seen and avoided it. There was no duty upon them to do so. To put the matter in another way: during the hours from 6 to 9 P.M., while in accordance with their decision they were lighting the entrance to Dun Lane, they were under a duty to exercise reasonable care in the way I have mentioned; but after 9 o'clock, when they had

decided not to light it, they were under no duty to light that place at all.

The authorities have been reviewed by my Lord and my brother Scrutton and with their criticisms on the cases I am in substantial accord. I only desire to add that the dictum of Lord Esher M.R. in *Lamley* v. *East Retford Corporation* (1), if it is correctly reported, appears to me, as it appears to my two brothers, to be far too wide. It was unnecessary for the decision of the case, and it would impose upon urban authorities a burden which the Public Health Act, 1875, never intended to impose upon them. All the cases in which liability for not lighting has been established against corporations regulated by that Act can be explained upon the footing that the corporation in question created the danger by which the plaintiff was injured. That was not so in the present case.

Each of the Lords Justices paid a tribute to counsel for the arguments on both sides.

Appeal allowed.

Solicitors for appellants: *Few & Co., for G. H. Lea, Glossop.*

Solicitors for respondent: *Blyth, Dutton & Co., for Charles Davis & Son, Glossop.*

(1) 55 J. P. 133.

W. H. G.

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June 2.

[IN THE COURT OF APPEAL.]

J. P. HALL & COMPANY, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Excess Profits Duty—Accounting Period—Profit—Date of making—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* 5, *c.* 89), *s.* 38.

In March, 1914, H. & Co. contracted to sell certain electric motors complete with control gear, deliveries to commence in July, 1914, and to terminate in September, 1915, payment to be within one month after delivery. In April, 1914, they made a sub-contract to purchase the control gear at a price which would yield to them a profit of 1064*l.* The deliveries of the control gear were made by the vendors under the sub-contract direct to the purchaser under the head contract, on various dates after August, 1914, the final delivery being in July, 1916:—

Held, that in assessing H. & Co. to excess profits duty, the profit on the purchase and sale of the control gear ought to be included in the accounting periods during which deliveries of the goods were effected, and not in the pre-war period during which the contract was made.

Decision of Rowlatt J. [1921] 1 K. B. 213 reversed.

APPEAL by the Inland Revenue Commissioners from the decision of Rowlatt J. upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The facts are fully stated in the report of the case in the Court below. (1)

Sir Gordon Hewart A.-G. and *R. P. Hills* for the appellants, the Commissioners. The respondents contend that as they were bound to make a profit on the sub-contract for the supply of the control gear, although payments were deferred until delivery at future dates, yet they are entitled to allocate the profits to the pre-war period during which the contracts were entered into. That argument is contrary to the system of book-keeping adopted by them, and to ordinary commercial procedure, according to which profits are not brought into account until they are realized. For the purposes of income tax the profits in this case would be treated as having been made at the respective times of payment. Excess

(1) [1921] 1 K. B. 213.

profits are to be ascertained on the same principles: Finance (No. 2) Act, 1915, s. 40.

Maugham K.C. and *A. M. Latter* for the respondents. The decision of Rowlatt J. is right. In a legal sense the profit on the supply of the control gear was made at the date of the sub-contract. The profit under the circumstances was certain, and was made during the pre-war period. The contracting companies were financially sound and the respondents had no work to do upon or in connection with the control gear. The fundamental meaning of "profits" is the amount of gain made by the business during the year: *In re Spanish Prospecting Co.* (1) The profit on this contract would be rightly included in the valuation of the assets of the respondents' business for the period ending June 30, 1914. The profit was ascertained and made in that period, and is not liable to excess profits duty. For income tax purposes the point would be immaterial, because if the profit was not brought into charge in one year, it would in another.

LORD STERNDALE M.R. I regret that I cannot agree with the learned judge in this case. Lord Esher M.R. in *City of London Contract Corporation* v. *Styles* (2) says something which may be in point on what we have to decide: "You must find new money in order to pay the expenses year by year, but then you do find money to pay the expenses year by year, and you get the receipts year by year, and the difference between the expenses necessary to earn the receipts of the year, and the receipts of the year are the profits of the business for the purpose of the income tax." Of course the learned Master of the Rolls does not there mean by receipts money which is actually received; he means debts which will be received, and which therefore on their face value require an allowance for bad debts. Again: "Here is a clear statement that the difference between money expended in the year in order to earn income which was to be received in the year, and the income so received, was 128,000*l.* That is the net profit within the year,

(1) [1911] 1 Ch. 92, 98. (2) (1887) 2 Tax Cas. 239, 244.

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and that is the sum upon which income tax is to be paid." There are other statements to the same effect which will be found quoted in Dowell on Income Tax, 8th ed., 497, and seem applicable to the present case. Here the respondents had made a contract under which they were to supply to a firm in Kirkcaldy certain motors and motor gear. It was a single contract; there were specific prices for the motors, and specific prices for the gear, and parts of the gear, but it was all one contract. They manufactured the motors themselves, but they did not manufacture the control gear. They made a contract with another firm to supply them with the control gear at a price which, if everything went right and the whole transaction was carried out, would leave them a profit on the control gear of 1064*l*. This case has been treated as though there were two contracts, one for the motors and the other for the control gear. I do not think that was the right way of treating it, and I do not see how you could say whether there would be a profit upon the contract made with the Kirkcaldy firm unless you took into account the whole of the contract. But, as it has been treated here as though the contract for the motors, and the contract for the control gear, although contained in one instrument, were two separate contracts, I will so treat it. The deliveries under both the contract with the Kirkcaldy firm, and the contract with the firm who made the control gear for the respondents, were to be at various future dates, which were in fact extended in consequence of the war; but they were to be future dates in any case. The respondents in keeping their accounts brought the profit on the contract into account on the various dates on which deliveries were made, and payments therefore became due, and, as all the firms concerned in the matter were of good financial standing and perfect solvency, all those debts were treated quite properly at their face value. The result of doing that was that the respondents would have to pay a certain amount of excess profits duty on the comparison of the accounting period with the pre-war period. But what they seek to do, and what Rowlatt J. has held they are entitled

to do, is to make up their accounts in a different way, and to carry into the profits of the pre-war period the whole of the 1064*l.* eventually realized upon the contract for the control gear. The accountant who was called, the respondent's auditor, said that that profit might well have figured in their accounts on June 30, 1914, but he admitted that in the ordinary way, and I rather think he meant the ordinary way of keeping business accounts, at any rate the ordinary way of keeping the respondents' accounts, such a profit would not be included in the accounts until the invoices were received, that is to say the actual dates of the delivery of the goods. Rowlatt J. has held that they are entitled to bring the whole of the profit upon this contract for the control gear into the year in which the two contracts were made, and I suppose, on the contention stated by the respondents before the Commissioners, that the profit on the transaction in question was ascertained and made on the completion of the contract. The simple answer is, that the profit was neither ascertained nor made at that time.

It was said that there are special circumstances in this case. I cannot see any at all. Only two were relied upon. First, that the respondents had not to do any work on the control gear at all. That does not seem to me to be a special circumstance; it is a circumstance that always happens when a man undertakes to supply certain articles, not of his own manufacture, and then makes a sub-contract for them. Next it is said that the people with whom the respondents contracted were of good financial reputation and solvent. I do not think that is an extraordinary circumstance. Those are not special circumstances, in my opinion, at all. As I have said, the short and simple answer to the respondents' contention is that these profits were neither ascertained nor made at the time that these two contracts were concluded. Many contingencies might have happened to prevent the realization of profit which was anticipated when the contracts were made. Many complications might have occurred that might have produced a different result. I think that the respondents did right in the way that they carried these

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profits into their accounts; it is the ordinary commercial way of making up accounts, and, in my opinion, it is the right way. It would be wrong to carry into the accounts, as profits of one year, the estimated profits which would accrue in subsequent years and which might perhaps never be made at all. I think the Commissioners, whose decision was reversed by the learned judge, came to a proper conclusion. This appeal should be allowed, and the Commissioners' decision restored with costs here and below.

ATKIN L.J. I agree. The proposition put forward by the respondents in this case seems to me so very unsound that I am really left in doubt whether I have fully appreciated it; but, as I understand it, it appears to me to be quite wrong. The profits for excess profits duty are to be assessed on the same basis as profits for income tax purposes, and the word "profits" for income tax purposes is to be understood in accordance with the words of Lord Halsbury in *Gresham Life Assurance Society* v. *Styles* (1), "in its natural and proper sense—in a sense which no commercial man would misunderstand." He further says that "profits and gains must be ascertained on ordinary principles of commercial trading." I need not say anything more after what has been said by the Master of the Rolls. It seems to me that no person here trying to ascertain these profits on the principles of ordinary commercial trading would dream of including in his yearly balance-sheet profits which would not be made until the goods had actually been delivered, in respect of a contract which was to run over a period of at least two years, and possibly more. To my mind, the procedure of the respondents in taking into account the profits that they made as and when the goods were delivered was the ordinary commercial procedure. Any other course would be quite contrary to commercial procedure. I think therefore this appeal should be allowed.

YOUNGER L.J. I am of the same opinion. It appears to me that the principle sanctioned by the learned judge in

(1) [1892] A. C. 309, 315, 316.

this case for the purpose of ascertaining these profits is not justifiable either for the purpose of excess profits duty or for the purpose of income tax, or as a matter of ordinary commercial trading. In my view the only proper way in which the profits arising from the working out of this contract ought to be brought into account is to ascertain them as and when they are realized.

Appeal allowed.

Solicitor for appellants: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Johnson, Weatherall, Sturt & Hardy.*

G. A. S.

MASKELL *v.* HILL.

1921 *June* 9, 17.

[1921. M. 1441.]

Gaming—Cheques given for Racing Bets—Bets made by Agent for Principal—Cheques given by Principal to reimburse Agent against Losses on Bets—Claim by Principal against Agent—Gaming Act, 1835 (5 & 6 *Will.* 4, *c.* 41), *ss.* 1, 2.

The defendant acting as the plaintiff's agent made bets with a third person. The plaintiff gave the defendant certain cheques to indemnify him in respect of the bets made by the defendant on the plaintiff's behalf with the third person. The defendant himself made no bets with the plaintiff, and the plaintiff made his bets upon the footing that the defendant was his agent and not a principal in the betting transactions. The plaintiff claimed to recover from the defendant under the Gaming Act, 1835, the amount of the cheques:—

Held, that the Gaming Act, 1835, had no application to a case where cheques were given by a principal to reimburse his agent for losses incurred by the agent through bets made by him on the principal's behalf.

ACTION tried by McCardie J.

The following statement of facts is taken from the judgment:—

"The statement of claim on the specially endorsed writ is this: 'The plaintiff claims against the defendant the sum of 627*l.* 8*s.* 6*d.* as and for the return of moneys paid

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by the plaintiff to the holders of the undermentioned cheques, of which cheques the defendant was the payee, for losses on bets on horse races made by the plaintiff with the defendant. The plaintiff claims under the Gaming Act, 1835 (5 & 6 Will. 4, c. 41). The following are the particulars.' The plaintiff then sets out the particulars of 10 cheques given by the plaintiff to the defendant over the period from March, 1920, to June, 1920. The total of the cheques is 627*l.* 8*s.* 6*d.*

"It will be seen that the claim is made on the footing that the plaintiff made bets with the defendant himself and paid the defendant by cheques in respect of those losses. This is the basis on which claims are usually made under s. 2 of the Gaming Act, 1835. But the allegations in this statement of claim are not borne out by the evidence in this case. I am satisfied that the plaintiff made his bets upon the footing that the defendant was an agent for him and not a principal in the betting transactions.

"The actual facts can be briefly stated. They are these: The plaintiff is a cooper by trade. The defendant at all material times was the manager of 'The Harrow Public House' which was owned by a man named Bennett, and then at a later date by Bennett's executors. The defendant knew a betting man named Chandler. The plaintiff employed defendant to make bets with Chandler. The plaintiff decided on the bets he wished to make, and then told the defendant of the bets he so wished to place. Thereupon the defendant telephoned the bets to Chandler who had an office in the City. Chandler then accepted the bets and recorded them. The bets in fact were accepted by Chandler as from the defendant. Chandler apparently knew and trusted the defendant. The defendant also made bets with Chandler on his own behalf. All the bets were made by the defendant in his own name. Each week Chandler sent an account to the defendant showing the bets lost or won. The plaintiff and defendant met, discussed Chandler's account, picked out the bets made by defendant for the plaintiff and by the defendant for himself, and thus adjusted the

account as between themselves. If Chandler's account showed a credit balance, then a cheque from Chandler for the amount accompanied the account, and the cheque when cashed was divided as agreed between the defendant and the plaintiff. If, however, Chandler's weekly account showed a debit, then the plaintiff (after his share of the debt was arranged with the defendant) gave the defendant a cheque for his agreed share of the debit. In each case the cheque was made out to 'J. Hill or order.' Each cheque was crossed. None of the cheques were marked 'not negotiable.' When the defendant got the cheques from the plaintiff he duly endorsed them to Bennett, whilst that individual was alive, who paid them into his banking account, and who then, after they were duly met, paid the cash to the defendant. After Bennett's death the defendant paid them into the account of the executors and thus cashed them. With the cash thus obtained through Bennett or Bennett's executors the defendant paid to Chandler the debit shown on the weekly account.

"I am satisfied that the defendant himself made no bet with the plaintiff. He was the plaintiff's agent to make bets with Chandler. The plaintiff's cheques were given to the defendant to indemnify him in respect of bets made by the defendant with Chandler on the plaintiff's behalf. The defendant was therefore a betting agent for, and not a betting principal with, the plaintiff. The plaintiff paid the defendant a commission on the winnings. Such are the facts."

Colam K.C. and *D. Warde* for the plaintiff.

Cautley K.C. and *H. L. Murphy* for the defendant.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

June 17. McCARDIE J. read the following judgment. This action raises a new point under s. 2 of the Gaming Act, 1835 (5 & 6 Will. 4, c. 41). It is wholly independent of the questions discussed in *Dey* v. *Mayo*. (1) If the contention

(1) [1920] 2 K. B. 346.

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of the defendant be right the operation of s. 2 of the Act of 1835 is greatly limited. [His Lordship having stated the facts set out above continued:] Mr. Colam K.C., for the plaintiff, contends that these facts fall within s. 2 of the Gaming Act, 1835. Mr. Cautley K.C., for the defendant, submits that s. 2 has no application to this case. He contends that s. 2 only applies as against a betting principal and that it does not cover the case of cheques paid to a betting agent to cover him from loss in respect of bets made by him on behalf of another. This contention is of practical interest. The able arguments before me have revealed the curious complexity of our betting laws. Now the Gaming Act, 1835, is an enactment which consists of two comparatively brief sections and an unusually long recital. Sect. 1, after reciting several Acts to which I refer later, provides: "Every note, bill, or mortgage which if this Act had not been passed would, by virtue of the said several lastly hereinbefore mentioned Acts or any of them, have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration, and the said several Acts shall have the same force and effect which they would respectively have had if instead of enacting that any such note, bill, or mortgage should be absolutely void, such Acts had respectively provided that every such note, bill, or mortgage should be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration: Provided always, that nothing herein contained shall prejudice or affect any note, bill, or mortgage which would have been good and valid if this Act had not been passed." Sect. 2 provides: "In case any person shall, after the passing of this Act, make, draw, give, or execute any note, bill, or mortgage for any consideration on account of which the same is by the hereinbefore recited Acts" of 16 Car. 2, 10 Will. 3, and 9 & 11 Anne, "or by any one or more of such Acts, declared to be void, and such person shall actually pay to any indorsee, holder, or assignee of such note, bill, or mortgage the amount of the money thereby secured, or any

part thereof, such money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given upon such illegal consideration as aforesaid, and shall be deemed and taken to be a debt due and owing from such last named person to the person who shall so have paid such money, and shall accordingly be recoverable by action at law in any of His Majesty's Courts of Record." This was the section recently discussed by the Court of Appeal in *Dey* v. *Mayo*. (1) The effect of s. 1 may be summarized by saying that every note, bill, or mortgage which under the Acts of Charles II. or William III. or Anne had been declared void should thenceforward be deemed only to have been given for an illegal consideration. This section did not affect any note, bill, or mortgage other than those affected by the Acts of Charles II. or William III. or of Anne. The operation of the section was strictly limited. The effect of s. 2 may be summarized by saying that it created a wholly new cause of action of debt. This new cause of action, however, was strictly confined to notes, bills, or mortgages, which fell within s. 1 of the Act. Unless therefore the note, bill or mortgage fell within s. 1 it afforded no basis for a claim under s. 2.

To what notes, bills and mortgages then does the Act of 1835 apply? The answer is to be found by a consideration of the following Acts: 16 Car. 2, c. 7: "An Act against deceitful, disorderly, and excessive gaming," and 9 Anne c. 14: "An Act for the better preventing excessive and deceitful gaming." Those are the only enactments now material to be mentioned from the recital which occupies a page and a half of vol. v. of Chitty's Statutes. The Acts of 10 Will. 3 and 11 of Anne merely applied to Ireland the respective Acts of 16 Car. 2 and 9 Anne c. 14.

Now the Act of 16 Car. 2 entitled "An Act against deceitful, disorderly, and excessive gaming" was passed in 1664. The preamble recites that: "Whereas all lawful games and exercises should not be otherwise used, than as innocent

(1) [1920] 2 K. B. 346.

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and moderate recreations, and not as constant trades or callings to gain a living, or make unlawful advantage thereby; and whereas by the immoderate use of them, many mischiefs and inconveniences do arise, and are daily found, to the maintaining and encouraging of sundry idle, loose and disorderly persons in their dishonest, lewd and dissolute course of life, and to the circumventing, deceiving, cousening and debauching of many of the younger sort, both of the nobility and gentry, and others, to the loss of their precious time, and the utter ruin of their estates and fortunes, and withdrawing them from noble and laudable imployment and exercises." Then the first section of the Act punished dishonest gaming. The second section was directed at excessive gaming; it fixed the limits of play and then provided (in substance) that all bonds, bills, etc., given for losses beyond the permitted limits should be void. The origin of this Act of Charles II. is to be found in the fact that a great improvement had then been made in the breed of horses by the importation of animals from Tangier, which formed part of Queen Catherine's dowry, and racing became a great national pastime. As a result the practice of betting vastly increased: see Stutfield on Betting, 3rd ed., p. 5.

The Act of 9 Anne c. 14 entitled "An Act for the better preventing excessive and deceitful gaming" was passed in 1710. It provided (in substance) that all notes, bills, etc., given for any money won by gaming or playing at cards, dice tables, tennis, bowls or other game or games whatsoever "or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent, or advanced for such gaming or betting, as aforesaid, or lent or advanced at the time and place of such play, to any person or persons so gaming or betting, as aforesaid, or that shall, during such play, so play or bet, shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever." This Act of Anne goes far beyond the statute of Charles II.: see the excellent formulation of the statute in Coldridge on Gambling, 2nd ed., pp. 49 et seq. Subject to the

provisions (already cited) of the Gaming Act, 1835, this section of the statute of Anne is still in force: see Chitty's Statutes, vol. v., p. 47, and Coldridge on Gambling, 2nd ed., p. 51.

Horse racing was specifically mentioned in the statute of Charles II., but not in that of Anne. It has however been settled in *Blaxton* v. *Pye* (1) and *Applegarth* v. *Colley* (2) that the pastime of horse racing fell within the statute of Anne. These decisions were approved by the Court of Appeal in *Woolf* v. *Hamilton*. (3) It is incidentally to be noted that a cricket match also falls within the statute of Anne: see *Jeffreys* v. *Walter* (4), where certain persons who styled themselves the "County of Kent" played against certain other persons who entitled themselves "All England" at a certain game called cricket, and where the plaintiff had won twenty-five guineas on a bet "upon tick" upon the said game. Holt C.J. and the other learned judges clearly inclined to the view that "cricket is a game," but this grave point in fact stood over for further and final argument. The reporter adds that then "the parties agreed, ut audivi."

If therefore a cheque be given by the loser to the winner to pay a bet lost (inter alia) on a horse race or a cricket match it will be given for an illegal consideration within the Gaming Act, 1835, inasmuch as both horse races and cricket matches fall within the statutes recited by that Act.

The question, however, is whether cheques given to an agent to enable him to pay bets lost by his principal, as in the present case, fall within the Act of 1835. Now the Act of 16 Car. 2 seems to have no bearing on this question, nor in my opinion does the Act of 9 Anne c. 14 touch the present case. It primarily deals, I think, with notes, bills, etc., given by one principal to another for bets, etc., lost. It does not appear to affect the relationship or mutual rights of principal and agent. It provides indeed that no claim can be made in respect of notes, bills, etc., given for the reimbursement or repayment of money knowingly lent or advanced for gaming or betting, or lent or advanced at the

(1) (1766) 2 Wils. 309.
(2) (1842) 10 M. & W. 723, 729.
(3) [1898] 2 Q. B. 337.
(4) (1748) 1 Wils. 220.

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time and place of such betting or gaming. It probably invalidates not only the security but the loan itself, though this point is not free from doubt: see Coldridge on Gambling, pp. 55 et seq., and the cases there cited. The limited operation however of the statute of Anne, and therefore of the Act of 1835, is shown by the fact that if money be lent to pay a loss actually incurred at betting or gaming, but which is not money advanced for the purpose of or at the time and place of such betting and gaming, it could be recovered. This seems the effect of *Alcinbrook* v. *Hall.* (1) So, too, if a cheque be given by the borrower in repayment of money so advanced, there is no illegal consideration within the statute of Anne and the Act of 1835: see *Ex parte Pyke, In re Lister.* (2) In that case one Barratt lent Lister money to pay bets which Lister had lost to third persons, and took promissory notes from Lister to the amount so lent. Lister became bankrupt. It was held by Jessel M.R. and James and Bramwell L.JJ. that Barratt could prove for the notes in Lister's bankruptcy. Jessel M.R. said (3) in discussing the Gaming Act, 1835: "The question, therefore, is whether the money thus lent by Barratt was 'knowingly lent or advanced for gaming or betting.' In my opinion it was not . . . . if money is lent to a man to enable him to make a bet, that is money 'lent for betting.' . . . . But in the present case the mischief had been completed . . . . before the money was lent. The money was advanced to enable the borrower to pay the bets which he had already made and lost, which seems to me an entirely different thing from a loan of money to enable a man to make a bet." This case of *Ex parte Pyke* (2) was followed by the Court of Appeal in *In re O'Shea.* (4) In *Rosewarne* v. *Billing* (5) Erle C.J. said (6): "I am clearly of opinion, that, if a man loses a wager, and gets another to pay the money for him, an action lies for the recovery of the money so paid." The principle of *Ex parte Pyke* (2) and *Rosewarne* v.

(1) (1766) 2 Wils. 309.
(2) (1878) 8 Ch. D. 754.
(3) Ibid. 757.
(4) [1911] 2 K. B. 981.
(5) (1863) 15 C. B. (N. S.) 316.
(6) Ibid. 322.

Billing (1) was in substance applied in the judgment of Pollock B. in *Beeston* v. *Beeston* (2) when after referring to 9 Anne c. 14 and the Gaming Act, 1835, he said: "those statutes only apply to securities between the parties wagering." That this is so seems reasonably clear when I consider the position of an ordinary betting agent before the Gaming Act, 1892 (55 & 56 Vict. c. 9). It has often been pointed out that mere betting on horse races is not illegal: see the authorities cited in my judgment in *Jeffrey* v. *Bamford*. (3) It is quite true that no action will lie against a betting agent for breach of contract in that he has failed to make bets pursuant to instructions from his principal: see *Cohen* v. *Kittell*. (4) This decision rests on the point that by 8 & 9 Vict. c. 109, s. 18 (The Gaming Act, 1845), the bets, if made, would not have been recoverable. But on the other hand, if the bets were made by the agent for his principal and lost, he had a right, prior to the Act of 1892, to be indemnified by that principal against the loss and to sue for the amount of betting losses paid by him on that principal's behalf. This rule was finally settled by the Court of Appeal in *Read* v. *Anderson* (5), affirming the judgment of Hawkins J. (6), where the relevant decisions are carefully reviewed. As Bowen L.J. put it (7): "the contract sued on by the plaintiff is not a wagering contract." It seems clear by implication from *Read* v. *Anderson* (5) and the earlier authorities cited in the judgment of Hawkins J. in that case, that the Gaming Act of 1835 can have had no application to bills or notes given by a principal to his agent to indemnify the agent for bets made and lost by the latter on his principal's behalf. If the Act of 1835 had been applied it would have resulted in the extraordinary position that a principal who, being bound in law to indemnify his agent, gave a cheque payable to the agent in order to carry out his legal duty of indemnity, could

(1) (1863) 15 C. B. (N. S.) 316.
(2) (1875) 1 Ex. D. 13, 16.
(3) [1921] 2 K. B. 351, 356 et seq.
(4) (1889) 22 Q. B. D. 680.
(5) (1884) 13 Q. B. D. 779.
(6) (1882) 10 Q. B. D. 100.
(7) 13 Q. B. D. 783.

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then sue the agent under s. 2 of the Gaming Act, 1835, in order to recover back the sum which he had paid in discharge of a binding legal obligation. In my opinion this absurdity has never existed and does not now exist in our system of law.

I do not forget the Gaming Act, 1892, which provides (in substance) that any promise to repay a person any sum of money paid by him in respect of any betting contract shall be void, and that no action shall be maintained to recover any such sum of money. The effect of this Act was to nullify *Read* v. *Anderson* (1), but it had no further result; it did not extend in the slightest degree the operation of the Acts of Charles or Anne or of the Gaming Act, 1835. As applied to the present facts it merely shows that the defendant had no legal right of indemnity in respect of betting losses incurred by him on the plaintiff's behalf. There was nothing, however, to prevent the plaintiff from paying his agent the moneys lost on his behalf. The payments actually made by the plaintiff, though made without consideration owing to the Gaming Act, 1892, were voluntary payments and irrecoverable: see per Erle J. in *Fitch* v. *Jones* (2); Leake on Contracts, 3rd ed., pp. 82 and 651.

I therefore hold that the Gaming Act, 1835, has no application to the present case. It does not hit the case of cheques given by a principal to reimburse his agent for losses incurred by the agent through bets made by him on the principal's behalf. The facts proved before me do not fall within the Act of 1835.

Mr. Colam K.C. in the course of the case asked for leave to amend the writ by adding a claim for money had and received based on the assertion that the defendant had not made the bets he had been directed to make, and that he had not duly expended the moneys paid to him by the plaintiff. I must refuse leave to so amend by the addition of this wholly different claim. In the first place, I am unable to see, upon the detailed evidence and documents before me, any adequate ground for the allegation. In the

(1) (1884) 13 Q. B. D. 779.

(2) (1855) 5 E. & B. 238, 247.

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second place, I am satisfied that any such claim would be, and is in any event met by the plea of accord and satisfaction set up by the defendant. I accept the evidence by and on behalf of the defendant and I hold that that plea is established. For the reasons given there must be judgment for the defendant with costs.

Judgment for defendant.

Solicitor for plaintiff: *Walter H. Cowl.*

Solicitors for defendant: *Durrant Cooper & Hambling.*

R. F. S.

[IN THE COURT OF CRIMINAL APPEAL.]

C. C. A.

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June 13, 27.

REX *v.* FRANK PEPPER.

REX *v.* ANNIE ELLEN PLATT.

Criminal Law—Sentence—Postponement—Death of Recorder—Jurisdiction of Successor to pass Sentence.

A prisoner was convicted at borough quarter sessions but sentence was postponed pending the hearing of an appeal to the Court of Criminal Appeal. The appeal was dismissed. The Recorder having died before the next quarter sessions:—

Held, that the new Recorder had jurisdiction to pass sentence upon the prisoner.

APPEAL on certificate from convictions at Stoke-upon-Trent borough quarter sessions.

The two prisoners were convicted of conspiracy. The prisoner Platt was bound over, and sentence on the prisoner Pepper was postponed. Before the appeal was heard the Recorder (W. H. Clay, Esq.) died.

J. B. Matthews K.C., *Burne* and *Pritt* for the appellants.

J. G. Hurst K.C. and *Graham Milward* for the prosecution.

Cur. adv. vult.

[The only point argued was whether there was evidence

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upon which the jury could find a verdict against Pepper. This report is concerned only with the jurisdiction to pass sentence.]

June 27. The judgment of the Court (A. T. Lawrence C.J., Lush, Rowlatt, Sankey, and McCardie JJ.) was read by

A. T. LAWRENCE C.J., who, after stating the conclusion of the Court that there was evidence upon which the jury could find a verdict against Pepper, and that the appeal must therefore be dismissed, continued as follows: With regard to the sentence upon Pepper, that was put off till the next quarter sessions. It is a matter of great regret that the learned Recorder who presided at the trial has died in the interval, but in our view the next court of quarter sessions presided over by his successor is entitled to pass sentence upon Pepper. We think that a copy of the short-hand note of the trial which has been before us should be supplied to him, and that Pepper or his counsel should have an opportunity of being heard before the sentence is pronounced.

Appeal dismissed.

Solicitors for appellants: *Doyle, Devonshire & Co., for James E. Moxon & Co., Hanley.*

Solicitors for prosecution: *Gibson & Weldon, for E. B. Sharpley, Stoke-upon-Trent.*

J. S. H.

TURNER *v.* KINGSBURY COLLIERIES, LIMITED.

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April 29;
May 6.

County Court—Judge sitting as Arbitrator under Workmen's Compensation Act—Whether Prohibition will lie—County Courts Act, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 127—*Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 3, *Second Sch.—National Insurance Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 55), *s.* 11, *sub-s.* 2.

A writ of prohibition will not lie to a county court judge when sitting and adjudicating under the provisions of the Workmen's Compensation Act, 1906, first, because he is sitting merely as an arbitrator, and secondly, because the Workmen's Compensation Act, 1906, provides one remedy and one remedy only for an error in an award of a county court judge when sitting and adjudicating under that Act—namely, by appeal to the Court of Appeal.

APPLICATION by the National Amalgamated Approved Society for a writ of prohibition to the judge of the Tamworth County Court and to the Kingsbury Collieries, Ld. The application was made to McCardie J. in chambers under s. 127 of the County Courts Act, 1888, and was adjourned into Court.

Proceedings were commenced in the Tamworth County Court in the name of John Turner against his employers, the Kingsbury Collieries, Ld., claiming compensation under the Workmen's Compensation Act, 1906, for personal injury alleged to have been caused by an accident arising out of and in the course of his employment. The application was dismissed on the ground (inter alia) that the accident did not arise out of or in the course of Turner's employment. The colliery company thereupon asked for costs against the National Amalgamated Approved Society of which approved society the applicant Turner was a member for the purposes of the National Insurance Act, 1911. The county court judge, after argument, ordered costs on Scale B against the society. The judge in giving judgment held (1.) that the applicant, Turner, had not unreasonably refused to take proceedings to enforce his claim; (2.) that the society had taken proceedings in the name and on behalf of the applicant; (3.) that the society had not informed the applicant as to his possible liability for costs, and had not sufficiently ascertained

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the circumstances of the accident; (4.) that the society had not merely given assistance or advice; and (5.) that in truth and in fact the proceedings were not taken by the applicant but by the society. A formal award was made and dated March 1, 1921, and it was signed "T. M. Snagge, Judge."

The society thereupon applied for a writ of prohibition to prohibit the county court judge and the Kingsbury Collieries, Ld., from further proceeding in the arbitration upon the order of the county court judge ordering the National Amalgamated Approved Society to pay the costs of the arbitration proceedings to the Kingsbury Collieries, Ld.

Holman Gregory K.C., *S. Duncan* and *Paull* for the National Amalgamated Approved Society.

E. W. Cave for the Kingsbury Collieries, Ld.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

1921. May 6. McCARDIE J. read the following judgment: This is an application by the National Amalgamated Approved Society for a writ of prohibition directed to the learned judge of the Tamworth County Court and to the Kingsbury Collieries, Ld. In view of the importance and novelty of the points at issue I adjourned the matter from chambers to Court so that the questions could be fully debated. I am indebted to counsel for their able arguments. The application to me in chambers was made under s. 127 of the County Courts Act, 1888, which provides: "It shall be lawful for any judge of the High Court, as well during the sittings as in vacation, to hear and determine applications for writs of prohibition to any Court and to make such orders for the issuing of such writs as might have been made by the High Court, and all such orders so made by any such judge of the High Court shall have the same force and effect as heretofore." I call attention to the word "Court" in that section.

The facts (so far as at present material to a preliminary point) can be stated briefly. [His Lordship stated the facts set out above and continued:] The society ask for a writ

of prohibition on the grounds (in substance): (1.) that they were not parties to the proceedings; (2.) that they had not taken proceedings in the name and on behalf of Turner; (3.) that Turner had not unreasonably refused or neglected to take proceedings to enforce his claim; (4.) that the judge had made the order for costs against them before hearing them on the point; and (5.) that he had no jurisdiction to make any order for costs against them.

To understand these points it is essential to set out s. 11, sub-s. 2, of the National Insurance Act, 1911. Sect. 11, sub-s. 1, contains provisions applicable where an insured person is entitled to compensation or damages under the Workmen's Compensation Act, 1906, or any scheme certified thereunder, or under the Employers Liability Act, 1880, or at common law. Sub-s. 2 provides: "Where an insured person appears to be entitled to any such compensation or damages as aforesaid and unreasonably refuses or neglects to take proceedings to enforce his claim, it shall be lawful for the society or committee concerned, either (*a*) at its own expense, to take in the name and on behalf of such person such proceedings, in which case any compensation or damages recovered shall be held by the society or committee as trustee for the insured person; or (*b*) to withhold payment of any benefit to which apart from this section such person would be entitled. In the event of the society or committee concerned taking proceedings as aforesaid and failing in the proceedings, it shall be responsible for the costs of the proceedings as if it were claiming on its own account."

Mr. Holman Gregory submits that it was a condition precedent to the power of his society to take proceedings in the name and on behalf of Turner (the workman) that the latter should have unreasonably refused and neglected to take proceedings to enforce his claim, and Mr. Gregory further points to the finding of fact by the learned judge that Turner had not unreasonably refused to take proceedings to enforce his claim. These matters, in view of various decisions, might call for consideration in conjunction with the facts before the county court judge.

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Mr. Cave, however, took a preliminary point—namely, that no writ of prohibition will lie in such a case as this. This submission falls under two separate heads. First, that a county court judge when acting under the Workmen's Compensation Act, 1906, is an arbitrator, and an arbitrator only, and that therefore no writ of prohibition can be directed to him. Secondly, that in any event para. 4 of the Second Schedule to the Workmen's Compensation Act provides one remedy only for judicial error by a county court judge—namely, by appeal to the Court of Appeal—and that such remedy is exclusive. The general importance of these points is plain.

Now, s. 1, sub-s. 3, of the Workmen's Compensation Act, 1906, provides: "If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the person injured is a workman to whom this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration, in accordance with the Second Schedule to this Act." The Second Schedule has various paragraphs. Para. 1 provides in substance where there is a committee as described that the matter is to be settled by the arbitration of that committee. Para. 2 provides, should there be no committee, that "the matter shall be settled by a single arbitrator agreed on by the parties, or in the absence of agreement by the judge of the county court, according to the procedure prescribed by rules of court." Para. 3 provides that "the matter, instead of being settled by the judge of the county court, may, if the Lord Chancellor so authorises, be settled according to the like procedure, by a single arbitrator appointed by that judge, and the arbitrator so appointed shall, for the purposes of this Act, have all the powers of that judge." Para. 4 says: "The Arbitration Act, 1889, shall not apply to any arbitration under this Act; but a committee or an arbitrator may, if they or he think fit, submit any question of law for the decision of the judge of the county court,

and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, or where he gives any decision or makes any order under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by rules of the Supreme Court either party appeals to the Court of Appeal. . . . ." Para. 7 (so far as material) says: "The costs of and incidental to the arbitration and proceedings connected therewith shall be in the discretion of the committee, arbitrator, or judge of the county court, subject as respects such judge and an arbitrator appointed by him to rules of court. . . . ." Para. 12 (so far as material) says "The duty of a judge of county courts under this Act, or in England of an arbitrator appointed by him, shall, subject to rules of court, be part of the duties of the county court, and the officers of the court shall act accordingly." These are, I think, all the statutory provisions which call for express mention.

I take it to be clear that the jurisdiction under s. 11, sub-s. 2, of the National Insurance Act, 1911, is one that can be and is to be exercised with equal powers either by an arbitrator under para. 3 of the Second Schedule or by an arbitrator, whether a county court judge or not, under para. 2 of that schedule. The function or duty under s. 11, sub-s. 2, of the National Insurance Act of 1911 is clearly judicial and not ministerial, and it seems to fall as much within the Second Schedule to the Workmen's Compensation Act, 1906, as any ordinary matter in dispute between a workman and employer. The words in para. 7 of the Second Schedule are, moreover, wide—namely, "The costs of and incidental to the arbitration and proceedings connected therewith," etc. I conceive therefore that s. 11, sub-s. 2, of the Act of 1911 must be read with and as a part of the Workmen's Compensation Act of 1906.

The contention of Mr. Gregory that prohibition will lie in the present case is, as I have said, of wide importance. It is agreed that since the Act of 1906 no writ of prohibition has ever been issued or even asked for against an arbitrator

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under the Act of 1906, whether a county court judge or not. If prohibition lies a new and serious line of procedure will be established. Mr. Gregory frankly admits that he wishes to create a hitherto non-existent practice. It is conceded that the National Amalgamated Society could have here appealed to the Court of Appeal: see for example *Doughty* v. *Altham Colliery Co.* (1), where Lord Cozens-Hardy M.R., Phillimore L.J. and Sargant J., dealt with facts resembling in many ways those now before me. The question here is whether the society can select at their option either an appeal to the Court of Appeal or prohibition from a King's Bench judge or a Divisional Court or perhaps an appeal under s. 120 of the County Courts Act, 1888, in cases where excess of jurisdiction is alleged. If Mr. Gregory be right it seems clear moreover that the issue of a writ of prohibition cannot be limited to points under s. 11, sub-s. 2, of the National Insurance Act, 1911. The writ must equally apply to all other matters under the Workmen's Compensation Act, 1906, where it is asserted that a county court judge has exceeded his powers therein.

Now the writ of prohibition is a judicial writ, issuing from a Court of superior jurisdiction and directed to an inferior Court for the purpose of preventing it from usurping a jurisdiction with which it is not legally vested: see Short and Mellor's Crown Office Practice, 2nd ed., p. 252. The proceedings to be prohibited must be of a judicial character, and not belonging to the executive government: Ibid., p. 253, and the cases there cited. If the jurisdiction of the judge of the inferior Court depends upon contested facts, it is his duty to decide upon the facts, and his decision cannot be questioned on prohibition: Ibid., p. 255; *Brown* v. *Cocking* (2); and the County Court Practice, 1921, notes to s. 127, where many cases on prohibition are collected. In Short and Mellor (p. 256) it is said: "It may be stated broadly that where an appeal lies prohibition does not." Several relevant decisions are there cited. I myself think, however, that there is no absolute technical obstacle to the co-existence

(1) (1916) 9 B. W. C. C. 298. (2) (1868) L. R. 3 Q. B. 672.

of both prohibition and appeal: see per Grove J. in *Barker* v. *Palmer* (1), and per Darling and Channell JJ. in *Sweetland* v. *Turkish Cigarette Co.* (2) On the question of convenience, however, the following suggestion on p. 257 of Short and Mellor may be here cited: "Seeing that all appeals from inferior Courts lie really to the same ultimate Court of Appeal, it is probable that the Courts will be unwilling to grant prohibition in any matters which can be corrected on appeal." The phrase "inferior Court" has been liberally interpreted: see Short and Mellor, 2nd ed., pp. 258 et seq. But I deem it clear that no prohibition will lie to an ordinary arbitrator. This seems plain on principle. See too per Channell J. in *Tunbridge Wells Corporation* v. *National Telephone Co.* (3) and Short and Mellor, 2nd ed., p. 262.

Now what is the position of a county court judge who is sitting and adjudicating under the provisions of the Second Schedule to the Workmen's Compensation Act? It is clear, I think, that he does not sit in his single capacity of county court judge: he sits as an arbitrator. Thus in *Mountain* v. *Parr* (4) the Court of Appeal held that a county court judge sitting to hear an application for compensation under the Workmen's Compensation Act, 1897, was acting as an arbitrator and had no jurisdiction to grant a new trial. A. L. Smith L.J. said (5): "When sitting to hear applications under this Act a county court judge is sitting merely as an arbitrator; from beginning to end the Act treats him as an arbitrator and nothing more." He also said (6): "The county court judge can only settle a matter under the Act as an arbitrator, and therefore this provision means that where the county court judge sits himself as arbitrator questions of law must, if his decision is not accepted, be remitted to the Court of Appeal. . . . . It is perfectly clear upon a consideration of the Act and its Schedules that the county court judge is to sit as arbitrator, and arbitrator only." In *Sutton* v.

(1) (1881) 8 Q. B. D. 9, 11.
(2) (1899) 80 L. T. 472.
(3) (1900) 83 L. T. 525, 530.
(4) [1899] 1 Q. B. 805.
(5) Ibid. 807.
(6) Ibid. 808.

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Great Northern Ry. Co. (1) the Court of Appeal again held that a county court judge sitting under the Workmen's Compensation Act, 1906, was acting as arbitrator only, and therefore could not order discovery of documents or interrogatories. Cozens-Hardy M.R. said (2): "Now the first and governing feature of cases of this kind is that they are arbitrations—they are not actions." Farwell L.J. said (3): "One has to bear in mind that the right to compensation under this Act is not a right based on tort or any other cause of action, but it is a statutory right given by the Legislature." He then refers to the procedure of the Act and says: "That is the only procedure provided at all, namely, arbitration." I may mention that special legislation—namely, the County Courts Act, 1919 (9 & 10 Geo. 5, c. 73), s. 25—was needed to meet the points established by the above decisions. Both *Mountain* v. *Parr* (4) and *Sutton* v. *Great Northern Ry. Co.* (1) were discussed and followed in *Taylor* v. *Cripps.* (5) Cozens-Hardy M.R. said (6): "This is an arbitration, not an action." Swinfen Eady L.J. said: "When sitting under the Workmen's Compensation Act the judge is an arbitrator only." The matter was put with remarkable breadth by Lord Robertson in *Powell* v. *Main Colliery Co.* (7): "The proceedings contemplated by the Act of 1897 for the settlement of claims are not primarily judicial proceedings; and the error of the respondents arises from overlooking this distinctive characteristic of the Act." These words I respectfully think must not be taken too literally. All determinations under the Act should be judicial in method and decision. I conceive that Lord Robertson meant only to point out that proceedings under the Workmen's Compensation Acts were sui generis, and that the specific procedure and technical formulæ of a county court action do not govern them. Proceedings under the Workmen's Compensation Act are controlled by the rules specially made under the Act itself. An examination of

(1) [1909] 2 K. B. 791.
(2) Ibid. 793.
(3) Ibid. 796.
(4) [1899] 1 Q. B. 805.
(5) [1914] 3 K. B. 989.
(6) Ibid. 993.
(7) [1900] A. C. 366, 381.

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those rules will show the distinctive nature of the practice. The Rules of Court made under the County Courts Act cannot be invoked except in so far as they are expressly applied by the Workmen's Compensation Rules, as for example by r. 2 (2.), rr. 17, 30 and 93 of the Workmen's Compensation Rules. It is provided by r. 1 of the Workmen's Compensation Rules that those rules shall apply not only to proceedings before the county court judge as arbitrator, but also to proceedings before an arbitrator appointed by the county court judge.

Now the result of the statutory provisions and decisions so far seems to be that a county court judge when sitting to determine under the Workmen's Compensation Act, 1906, is an arbitrator and an arbitrator only. Mr. Holman Gregory however submits that the judge occupies a double capacity when so sitting, and that he is at once an arbitrator and a county court judge. He points to para. 12 of the Second Schedule to the Act of 1906 which says: "The duty of a judge of county courts under this Act, or in England of an arbitrator appointed by him, shall, subject to rules of court, be part of the duties of the county court," and he relies on the decision of Grantham and Channell JJ. in *Tunbridge Wells Corporation* v. *National Telephone Co.* (1) This decision calls for careful consideration. The broad facts in that intricate case were that under the Telegraph Acts it was provided that certain disputes and differences should be referred to arbitration. The Corporation of Tunbridge Wells refused their consent to certain works, and the National Telephone Co. applied to the county court judge as arbitrator under ss. 3 and 4 of the Telegraph Act, 1878, to determine the disputes between the corporation and the company under the agreement they had entered into. The corporation thereupon applied for a writ of prohibition to the Divisional Court. It was held by the Divisional Court that the county court judge had no jurisdiction to determine the dispute as the company being only the delegates of powers from the Postmaster-General could not proceed under ss. 3 and 4 of the Telegraph Act, 1878. A writ of prohibition

(1) 83 L. T. 525.

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was therefore granted. In his judgment Channell J. said (1): "Is this a matter for prohibition? Would the county court judge in acting under this power be acting in a judicial manner and in reference to his office? If he would, and he is proposing to use his powers by reason of a fact not existing, which alone could give him the powers, he can be stopped by prohibition. If, on the other hand, in acting, he is merely acting as an arbitrator, prohibition would not lie. There is no authority of course upon this. There are words in this Act which indicate that for certain purposes he is an arbitrator, no doubt, but it seems to me that he is selected because he is a county court judge and that he acts as county court judge in dealing with the matter by a special jurisdiction conferred upon him as county court judge by this particular Act. And there are very many instances in which very special and peculiar jurisdiction is conferred upon the county court judges by special Acts, and I think that in exercising those special jurisdictions they act as county court judges in a judicial matter and are subject to be prohibited." It is natural that Mr. Holman Gregory should rely on these words, and I need scarcely express the deep respect I feel for any opinion of Channell J. The question appears to be: Was the matter referred to the county court judge as such in order that he might act as a county court judge in fulfilling the duties of an arbitrator, or was the matter referred to him as an arbitrator only and not in his capacity as a county court judge, although selected for that post and status because he happened to be a county court judge? I think that the *Tunbridge Wells Case* (2) turned on the point that there the matter was referred to the judge as a county court judge to act as such, and the Divisional Court thought that in acting as arbitrator he was acting, not as a mere arbitrator, but in his capacity and with the attributes of his status as a judge of county courts. If so, prohibition would apparently lie. The point as to prohibition was not raised when the *Tunbridge Wells Case* went to the Court of Appeal. (3) In matters

(1) 83 L. T. 530. (2) 83 L. T. 525.

(3) See 85 L. T. 368.

under the Workmen's Compensation Act, 1906, however, the scheme seems to be otherwise. The dispute goes to the county court judge, not as a county court judge, but as an arbitrator whose selection as a persona designata happens in the circumstances to spring from the fact that he is a county court judge. He seems to be just as much a mere arbitrator as one who is appointed arbitrator by agreement between the parties under para. 2 of the Second Schedule to the Act, or one who is appointed arbitrator by the county court judge under para. 3 of that schedule. Para. 12 of the schedule seems to be part of a method for the automatic appointment of a given arbitrator under given circumstances. The powers of a county court judge sitting as arbitrator under the Workmen's Compensation Act, 1906, arise not from the County Courts Act and rules but from the Workmen's Compensation Act and rules. This is conspicuously shown by the latter part of para. 4 of the Second Schedule which expressly provides: "The judge of the county court, or the arbitrator appointed by him, shall, for the purpose of proceedings under this Act, have the same powers of procuring the attendance of witnesses and the production of documents as if the proceedings were an action in the county court." For the reasons given and in view of the unique nature of the proceedings under the Workmen's Compensation Act, 1906, I do not think that the *Tunbridge Wells Case* (1) governs the point before me. I must hold that prohibition will not lie to an arbitrator under the Workmen's Compensation Act, whether he be a county court judge or an arbitrator appointed under paras. 2 or 3 of the Second Schedule. With respect to prohibition each seems to stand on the same footing. I further hold that such an arbitrator is not a "Court" within s. 127 of the County Courts Act, 1888, as defined by s. 186 thereof. The definition of "Court" in s. 186 of the County Courts Act is this: "'Court' or 'County Court' shall mean and include any court held under this Act." Arbitrations under the Workmen's Compensation Act, 1906, are not, I think, held under the County Courts Act of 1888.

(1) 83 L. T. 525.

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Even if I am wrong in the above conclusions I should still be of opinion that a writ of prohibition cannot here be granted by reason of para. 4 of the Second Schedule. In my humble view Mr. Cave was right in his contention that para. 4 provides one remedy only for error such as that here urged against the award of the county court judge. It provides that where he gives any decision or makes any order under the Act, it shall be final, unless within the time and in accordance with the conditions prescribed by rules of the Supreme Court either party appeals to the Court of Appeal. As I have said, I think that s. 11, sub-s. 2, of the National Insurance Act, 1911, must for the present purpose be read as if it were a part of the Workmen's Compensation Act, 1906. Para. 4 of the Act of 1906 is wider than the corresponding provisions of the Act of 1897. Under the Act of 1897 appeals against a refusal to order taxation of costs: see *Welland* v. *Great Western Ry.* (1), or a refusal to review taxation: see *Keane* v. *Nash* (2) and *Rigby & Co.* v. *Cox* (3), would not lie to the Court of Appeal. But now by para. 7 of the Second Schedule to the Act of 1906 such questions fall within a decision under the Act, and appeals therefore will now lie to the Court of Appeal: see for example *Smith* v. *Abbey Park Steam Laundry Co.* (4) Thus the Act of 1906 contemplates the widest possible right of appeal to the Court of Appeal. In *Moss* v. *Great Eastern Ry. Co.* (5) it was held by the Court of Appeal that under clause 4 of the Second Schedule to the Act of 1906 an appeal now lies to the Court of Appeal from the decision of a county court judge on a preliminary question of law, or as to his jurisdiction to entertain proceedings, and not, as formerly, only after an award had been made. In his judgment Farwell L.J. refers (6) to the words of para. 4 of Sch. 2 and says: "It seems to me that by those words the Legislature intended to extend the jurisdiction, and that all appeals should come here, and therefore that an appeal lies to us from the present decision. This course is

(1) (1900) 16 Times L. R. 297.
(2) (1903) 19 Times L. R. 419.
(3) [1904] 1 K. B. 358.
(4) (1909) 2 B. W. C. C. 142.
(5) [1909] 2 K. B. 274.
(6) Ibid. 278.

obviously much more convenient than that resort should be had to a writ of prohibition or some other proceedings." It may well be that Farwell L.J. meant to apply a rule like to the rule established by the Court of Appeal upon s. 15 and s. 299 of the Public Health Act, 1875 : see *Peebles* v. *Oswaldtwistle Urban Council.* (1) That rule was concisely put by Lopes L.J. (2) : " Where a new obligation is created by statute, and a specific remedy is provided for infringement of the duty, that statutory remedy is the only one." The case of *Moss* v. *Great Eastern Ry.* (3) certainly does not favour the view that prohibition will lie against a county court judge when acting as arbitrator under the Workmen's Compensation Act. In *Bonney* v. *Joshua Hoyle & Sons* (4), where para. 9 (*d*) of the Second Schedule was in question, Evans P. (in a judgment with which Cozens-Hardy M.R. concurred) said (5) : " Paragraph 4, and particularly the words added to it when the 1906 Act was passed, reasonably and properly construed are consistent with the policy of the Act in avoiding multiplication of appeals, and in my opinion enact that the appeal from a decision or order of a county court judge under paragraph 9 (*d*) should be direct to this Court." Eve J. expressed the same view. (6) It is obvious that if I held that prohibition should here be granted I should create the very evil pointed out by Evans P. in *Bonney's Case.* (5) Every day points arise before county court judges as arbitrators under the Act of 1906 which raise questions of jurisdiction. The questions range from the meaning of such words as " employer," " workmen," " accident," " course of employment " and the like to points as to costs or other detailed matters. Unless the privilege of appeal by an aggrieved person be confined to a right to go direct to the Court of Appeal itself a wide vista is at once created of applications to a judge in chambers for writs of prohibition or to a Divisional Court for the like writs and possibly of appeals to a Divisional Court under s. 120 of the County Courts Act, 1888. The

(1) [1897] 1 Q. B. 625.
(2) Ibid. 628.
(3) [1909] 2 K. B. 274.
(4) [1914] 2 K. B. 257.
(5) Ibid. 264.
(6) Ibid. 265.

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result might be constant confusion and many appellate proceedings.

Upon the whole I think that the Act of 1906 meant to provide by the code there enacted that all appeals from the decisions of county court judges as arbitrators under the Act should go direct to the Court of Appeal and should go to that tribunal alone. Here the decision complained of was given by the county court judge as arbitrator, and was contained in an award made by him as such arbitrator.

I may add that if the matter be one of discretion for me, I feel it my duty to exercise that discretion by refusing a writ of prohibition in the present case. The question of discretion is one of much difficulty. In Shortt on Informations, Mandamus and Prohibition (1887), p. 441, there is this passage: "It may be doubted whether any legal question has ever given rise to so great a conflict of judicial opinion as the question—whether the grant of a prohibition is discretionary, or whether it is demandable of right." In that treatise the decisions are collected and the curious variation of weighty authorities is strikingly shown. Later authorities are collected in Halsbury's Laws of England (1909), vol. x., p. 144, and see also p. 141. Upon the whole I come to the conclusion, though not without doubt, that upon the circumstances of the present case the grant of a writ of prohibition would be discretionary apart from the preliminary point. No error is here, I think, apparent on the face of the record within the technical meaning of those words.

The points at issue here can be dealt with rapidly, powerfully and with substantial finality by the Court of Appeal. They have been indirectly or directly considered by that Court in such cases as *Burnham* v. *Hardy* (1); *Doughty* v. *Altham Colliery Co.* (2); *Rushton* v. *George Skey & Co.* (3); *Allen* v. *Francis* (4); and *Skelton* v. *Baxter.* (5) I have given the best attention I can to this important and difficult matter. I appreciate fully the arguments of

(1) (1915) 8 B. W. C. C. 57.
(2) 9 B. W. C. C. 298.
(3) [1914] 3 K. B. 706.
(4) [1914] 3 K. B. 1065.
(5) [1916] 1 K. B. 321.

Mr. Holman Gregory for the society. But I must accede to the contention of Mr. Cave. The application is therefore dismissed with costs.

Application dismissed.

Solicitors for society : *Kingsley Wood, Williams & Co.*

Solicitors for colliery company : *Peacock & Goddard, for Elliot, Smith & Co., Mansfield.*

R. F. S.

[IN THE COURT OF APPEAL.]

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April 13, 14, 15 ; *May* 6.

JOHN ROBINSON AND COMPANY, LIMITED *v.* THE KING.

[1919. J. 180.]

Emergency Legislation—Requisition of Goods—Food Controller—Cattle Feeding Stuff—Petition of Right—Defence of the Realm Regulations, 2 B, 2 F —Validity—Judgment—Appeal—"Legal proceedings instituted"—Indemnity Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 48), *s.* 1.

The Food Controller requisitioned certain cattle feeding stuffs under the Defence of the Realm Regulations, but whether under reg. 2 B or reg. 2 F was doubtful. By reg. 2 B the price to be paid for goods taken thereunder was to be determined by the tribunal by which claims for compensation under the Defence of the Realm Regulations were determined, but was not to exceed a certain maximum price fixed by an Order in Council. By reg. 2 F compensation for goods taken thereunder was to be paid as determined by an arbitrator, taking into account the cost of production of the goods and a reasonable profit. The maximum price fixed by the Order in Council had been paid. The Defence of the Realm Losses Commission having refused to entertain a claim for compensation, the owners of the goods presented a petition of right, claiming that the Food Controller had acted under reg. 2 F, and that they were entitled to compensation fixed by arbitration thereunder. At the trial the judge held that the Controller had acted under reg 2 B, and dismissed the petition.

On July 22, 1920, the suppliants gave notice of appeal. On August 16, 1920, the Indemnity Act, 1920, was passed. By s. 1 of that Act, "No action or other legal proceeding . . . . shall be instituted in any Court of law . . . . in respect of any act . . . . done . . . . during the war before the passing of this Act . . . . if done . . . . in the public interest

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by a person holding office under . . . . the Crown, ... and if any such proceeding has been instituted, whether before or after the passing of this Act, it shall be discharged and made void. . . . ." :—

Held, (1.) by Bankes, Scrutton and Atkin L.JJ., that the appeal was not a "proceeding instituted" within the meaning of that section;

Hood Barrs v. *Cathcart* [1894] 3 Ch. 376 and *Hood Barrs* v. *Heriot* [1897] A. C. 177 followed and applied:

(2.) By Bankes and Atkin L.JJ. (Scrutton L.J. dissenting), that those words do not include a final judgment given before the passing of the Act, and therefore that the appeal well lay.

Held, per Curiam, (3.) that the goods were taken under reg. 2 B; (4.) that the provisions of that regulation for fixing the price of goods taken thereunder were not ultra vires;

Newcastle Breweries v. *The King* [1920] 1 K. B. 854 and comment of Lord Dunedin thereon in *Attorney-General* v. *De Keyser's Royal Hotel* [1920] A. C. 508, 529 questioned. Comment of Greer J. in *Hudson's Bay Co.* v. *Maclay* (1920) 36 Times L. R. 469 approved:

(5.) that the suppliants were not precluded by that regulation from having the price of their goods fixed by the Supreme Court upon the terms of the regulation; on the ground, per Bankes L.J., that there was in the circumstances no other tribunal for determining their claim for compensation under the Defence of the Realm Regulations; per Scrutton L.J. that the regulation contained no sufficient designation of a tribunal other than and exclusive of the Supreme Court.

Declared accordingly, per Bankes and Atkin L.JJ. (Scrutton L.J. assenting but for s. 1 of the Indemnity Act), that the suppliants were entitled to payment for the goods at prices to be determined in accordance with reg. 2 B and to an account of what was due to them on that basis.

Judgment of Darling J. reversed.

APPEAL from the judgment of Darling J. in a petition of right heard before the learned judge without a jury.

The petition of right was presented on October 24, 1918. The suppliants were manufacturers of compound cake which is used as food for cattle. In or about March, 1918, they owned and held in their warehouses for use in the process of manufacturing cake 677 tons of bran and 251 tons of pollards. They had acquired the bran at 15*l.* 1*s.* 5*d.* a ton and the pollards at 17*l.* 2*s.* 2*d.* a ton, but the value of the goods to the suppliants was higher than the respective prices paid. They alleged that by letters dated March 16 and 27, and April 8, 1918, the Food Controller purporting to act under the Defence of the Realm Regulations had required the suppliants to place the said bran and pollards at his disposal and to invoice the same in various lots to persons nominated

by him and to weigh and pack the lots and cart them to the railway station; that they had obeyed these requirements; that the Food Controller was willing to pay the suppliants for the bran at the rate of 12*l.* 13*s.* 9*d.* a ton and for the pollards at the rate of 14*l.* 14*s.* a ton, but refused to pay the cost of the said goods with or without a reasonable profit thereon, or their value, and refused to admit the right of the suppliants to compensation or to refer their claim to any tribunal capable of dealing with legal rights. They contended first, that they had a legal right to be paid for the bran and pollards, and that the amount of the payment should be the cost of the said goods together with a reasonable profit thereon, or alternatively the value of the goods; secondly, that they were entitled to have this price fixed by arbitration; and thirdly, that if the Cattle Feeding Stuffs (Requisition) Order, 1918 (1), purported to exclude these rights it was ultra vires and void. They therefore prayed for declarations: (1.) that they were by law entitled to be paid for the 677 tons of bran and 251 tons of pollards; (2.) that they were entitled to have their claim referred to arbitration or submitted to some legal process or that an account should be taken by the King's Bench Division of the amount of compensation payable to them.

In the answer by the Crown the Attorney-General admitted that on April 5 the Ministry of Food requisitioned the bran and pollards under reg. 2 B of the Defence of the Realm Regulations (1) and that the suppliants delivered the same in pursuance of the requisition and were entitled to be paid a price to be determined in accordance with that regulation by the Defence of the Realm Losses Commission. He contended on behalf of the Crown that by the provisions of reg. 2 B and of the Cattle Feeding Stuffs (Maximum Prices) Order, 1918 (1), the maximum prices payable to the suppliants were those fixed by that order which the Food Controller was at all times ready and willing and by a letter dated March 16, 1918, offered to pay and had since paid to the suppliants.

(1) See note on p. 210, post.

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On February 18, 1918, the suppliants wrote to the Secretary to the Ministry of Food: "In conformity with the Cattle Feeding Stuffs Requisition Order we beg to enclose particulars of our stocks and purchases of cattle feeding stuffs which had not been already requisitioned on January 21 by the previous order." These cattle feeding stuffs included 677 tons of bran and 251 tons of pollards.

On February 25 the Director of Feeding Stuffs at the Ministry of Food wrote to the suppliants requesting them to forward samples of the bran and pollards referred to in their letter of the 18th. Samples were sent, and on March 16 the Director wrote to the suppliants that he was prepared to pay 13*l.* a ton for the bran, the amount set out in the Maximum Prices Order, less 6*s.* 3*d.* a ton commission as stated in that order; and 12*l.* 12*s.* 6*d.* a ton for the pollards. On March 18 the suppliants wrote: "With regard to the offers you make us for the bran and pollards, if you requisition them are we not entitled to receive cost price for them? . . . . Your proposal will leave us with a heavy loss to face, and we cannot accept it unless compelled to do so." On March 27 the Director wrote: "I am afraid I must ask you to hold the bran and pollards referred to in my letter of the 16th inst. at the disposal of the Food Controller. Please therefore let me have delivery orders and invoices for the bran on the lines mentioned in that letter. With regard to the pollards, you can of course only deal with these under the Maximum Prices Order of February last, and as I have told you I am prepared to pay you the price provided by that order. Please let me hear from you at once or I must take steps to obtain delivery of these offals." In answer to a letter from the suppliants dated February 28, the Director wrote on April 5, 1918: "Please take this letter as an intimation that the bran is definitely requisitioned under the Requisition Order. (1) As regards the question of price I would refer you to Regulation 2 B of the Defence of the Realm Regulations which governs the price to be paid to you. As regards the question of pollards, I have already told you I am prepared

(1) Namely, No. 58 of 1918. See post, p. 210.

to pay you the price provided by the Maximum Prices Order of February last." After further letters had passed between the parties, on April 20 a letter was written on behalf of the suppliants containing the following passage: "You may please accept this letter as placing at your disposal the quantities mentioned, viz. 677 tons of bran and 251 tons of pollards, and Messrs. J. Robinson & Co. Ld. will deliver according to any instructions issued by you."

Deliveries were subsequently made by the suppliants according to instructions issued by the Food Controller.

On July 22, 1918, the solicitors to the suppliants wrote to the Secretary to the Defence of the Realm Losses Commission: "Our clients claim to be entitled to compensation in respect of the requisition by the Food Controller of certain bran and pollards which were in their possession in April and May for the purpose of their business as manufacturers of compound cake. The department suggest that this claim ought to be preferred to and dealt with by your Commission. Our clients are advised that their claim is a claim legally enforceable. We are not sure whether the Commission deals with claims that are legally enforceable and which have to be determined as by arbitrators enforcing legal rights in the place of a judge, and before submitting particulars of their claim we should be glad to be informed upon this point." In answer to this letter the Secretary to the Commission wrote on July 26: "I am directed by the Defence of the Realm Losses Commission to state that in view of the fact their terms of reference do not extend to cases otherwise provided for, they are unable to entertain an application in respect of matters as regards which the applicant possesses, or claims to possess, any rights enforceable in a Court of law. A copy of the Commission's terms of reference is enclosed." The terms of reference enclosed were: "The Commission have been appointed 'to enquire and determine, and to report what sums (in cases not otherwise provided for) ought in reason and fairness to be paid out of public funds to applicants, who (not being subjects of an enemy state) are resident or carrying on business in the United Kingdom, in respect

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of direct and substantial loss incurred and damage sustained by them by reason of interference with their property or business in the United Kingdom through the exercise by the Crown of its rights and duties in the defence of the realm.' "

Darling J. on July 7, 1920, gave judgment. He held that the bran and pollards were requisitioned under reg. 2 B of the Defence of the Realm Regulations; that reg. 2 B and the Cattle Feeding Stuffs (Maximum Prices) Order, 1918, were not ultra vires but were valid and binding; that consequently, by the combined operation of the proviso to the regulation and the order, the suppliants could recover no more than the maximum prices fixed by the order, and were not entitled to have compensation assessed as provided by reg. 2 F (1) or as claimed in the petition of right. He therefore gave judgment for the Crown.

The suppliants appealed.

Branson (*Sir Gordon Hewart A.-G.* and *Sir Ernest Pollock S.-G.* with him) for the Crown took a preliminary objection to the appeal. Notice of appeal was given on July 22, 1920. On August 16, 1920, the Indemnity Act, 1920 (1), received the Royal Assent. The Court must take that statute into account, notwithstanding that it was passed since the date of the judgment under appeal: *Quilter* v. *Mapleson* (2); *Attorney-General* v. *Birmingham Drainage Board* (3); *Stovin* v. *Fairbrass.* (4) This appeal is a legal proceeding. It was instituted by the notice of appeal on July 22. An appeal is a separate proceeding from the writ in the action. The two proceedings differ in process practice and mode of pleading: *Attorney-General* v. *Sillem* (5), per Lord Westbury L.C. Before the Judicature Acts an appeal was instituted by a writ of error; now it is by notice of appeal; but the notice of appeal is none the less the institution of a new proceeding. It is a proceeding instituted for an act done during the war before the passing of that statute

(1) See note on p. 210, post.
(2) (1882) 9 Q. B. D. 672.
(3) [1912] A. C. 788.
(4) (1919) 88 L. J. (K. B.) 1004.
(5) (1864) 10 H. L. C. 704, 724.

and done in the public interest by a person holding office under the Crown. By s. 1, sub-s. 1, of the Indemnity Act, no such proceeding shall be instituted in any Court of law, and if it is instituted it shall be discharged and made void. By s. 2, sub-s. 1 (*b*), the appellants are entitled to payment or compensation under the Act but not otherwise, and by s. 2, sub-s. 2 (i.), the payment or compensation is to be fixed in accordance with regulations and orders applicable thereto; that is to say no more than the maximum prices fixed by the Cattle Feeding Stuffs (Maximum Prices) Order, 1918, can be awarded, and by s. 2, sub-s. 4, the tribunal to assess the compensation is the Defence of the Realm Losses Commission.

Secondly, the judgment of Darling J. is itself a legal proceeding within s. 1, sub-s. 1, and the same result follows—namely, that the Defence of the Realm Losses Commission is the tribunal to assess compensation as directed by the Maximum Prices Order.

MacKinnon K.C. and *Micklethwait* contra. An appeal is not the institution of proceedings: *Hood Barrs* v. *Cathcart* (1); approved in *Hood Barrs* v. *Heriot.* (2) The jurisdiction of the superior Courts is not to be ousted except by an express enactment of the Legislature: *Rex* v. *Moreley* (3); *Oram* v. *Brearey.* (4) The Indemnity Act, 1920, contains no express words ousting the jurisdiction of the Court of Appeal; on the contrary s. 1, sub-s. 4, recognizes that jurisdiction. It cannot be that after succeeding in the King's Bench Division and in this Court suppliants must litigate their claims ab initio before the Defence of the Realm Losses Commission.

Branson in reply. *Hood Barrs* v. *Cathcart* (1) was a decision upon s. 2 of the Married Women's Property Act, 1893, which empowered the Court to order that the costs of a proceeding instituted by a married woman should be paid out of her separate estate notwithstanding a restraint upon anticipation. There was good reason for holding that enactment inapplicable to an appeal by a married woman from a judgment in an

(1) [1894] 3 Ch. 376.
(2) [1897] A. C. 177.
(3) (1760) 2 Burr. 1040.
(4) (1877) 2 Ex. D. 346.

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action brought against her. She did not originate the process in which the costs were incurred. The party who really did that was the plaintiff in the action. There is no such reason in the present case for limiting the meaning of "proceeding instituted."

The Court decided to hear the appeal on the merits before deciding the preliminary point.

MacKinnon K.C. and *Micklethwait* for the appellants.

1. Darling J. was wrong in holding that the bran and pollards were requisitioned under reg. 2 B. The correspondence and particularly the letter of April 20 shows that they were tendered under reg. 2 F and the facts show that they were accepted accordingly. That being so the appellants are entitled to compensation.

2. If the learned judge was right in holding that the goods were taken under reg. 2 B, the appellants are still entitled to recover, because so much of that regulation as relates to the price of goods taken is ultra vires and void: *Newcastle Breweries* v. *The King* (1), approved by Lord Dunedin in *Attorney-General* v. *De Keyser's Royal Hotel.* (2)

3. If the regulation is intra vires it still does not oust the jurisdiction of the High Court. It provides that the price to be paid for the goods shall be determined "by the tribunal by which claims for compensation under these regulations are . . . . determined." No such tribunal is named in the regulations. There was in existence the Defence of the Realm Losses Commission, but that tribunal declined to hear any claim based upon a legal right. The appellants therefore had a right of recourse to the High Court of Justice: *Central Control Board* v. *Cannon Brewery Co.* (3), per Lord Atkinson.

Sir Ernest Pollock S.-G. and *Branson* (*Sir Gordon Hewart A.-G.* with them) for the Crown.

[BANKES L.J. The Court are satisfied that the goods were taken under reg. 2 B.]

That regulation is intra vires and valid: *Hudson's Bay Co.* v. *Maclay* (4): "The tribunal by which claims for

(1) [1920] 1 K. B. 854.
(2) [1920] A. C. 508, 529.
(3) [1919] A. C. 744, 752.
(4) 36 Times L. R. 469.

compensation under these regulations are . . . . determined" is the Defence of the Realm Losses Commission: *Newcastle Breweries* v. *The King*. (1) A mandamus will issue to that tribunal if it refuses to hear, when it ought to hear, a claim. That tribunal, and not the High Court, is the tribunal to hear the suppliant's claim.

Cur. adv. vult.

May 6. The following written judgments were delivered:—

BANKES L.J. In March and April, 1918, the Food Controller requisitioned a quantity of bran and pollards, the property of the suppliants. The Minister and the suppliants were unable to agree as to the price which the suppliants were entitled to be paid for their goods or as to the tribunal by which that price should be ascertained. The suppliants accordingly presented a petition of right, in which they prayed for a decision on these points. In the answer to the petition the Attorney-General set up that the requisitioning of the goods was made under reg. 2 B of the Defence of the Realm Regulations and admitted the suppliants' legal right to be paid a price to be determined in accordance with that regulation by the Defence of the Realm Losses Commission. He further contended that the Food Controller had always been ready to pay and had paid to the suppliants for their goods the maximum prices to which they could have been entitled under the said regulation and the Cattle Feeding Stuffs (Maximum Prices) Order, 1918. The petition was tried before Darling J. and the two main points contested before him were: (1.) whether the requisitioning of the goods was made under reg. 2 F, as the suppliants contended, or under reg. 2 B, as the Crown contended; and (2.) whether reg. 2 B was ultra vires. The learned judge decided both points in favour of the Crown.

In this appeal a number of points have been taken which might have been but apparently were not taken before the learned judge, and on behalf of the Crown objection has been taken to any hearing of the appeal on the ground that the

(1) [1920] 1 K. B. 854, 864.

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notice of appeal is the "institution of a legal proceeding" within the meaning of s. 1, sub-s. 1, of the Indemnity Act, 1920, and also to the exercise by this Court of any jurisdiction in this appeal other than by making an order referring the dispute to the tribunal set up under that Act. I will deal with these questions arising under the Indemnity Act before dealing with the case of the suppliants.

The judgment in this action was given on July 7, 1920, and the notice of appeal on July 22. The Indemnity Act, 1920, received the Royal Assent on August 16. Sect. 1, sub-s. 1, of that Act provides as follows: [The Lord Justice read s. 1, sub-s. 1, of the Act, and proceeded:] Two points arise on the language of the section. First, is the suppliants' notice of appeal, given before the passing of the Act, the "institution of a legal proceeding" within the meaning of the section? Secondly, does the word "proceeding," which the section declares to be discharged and made void, include the judgment pronounced by Darling J. on July 7? In my opinion the contention of the Crown fails on both points. Apart from any authority, I should have been prepared to say the expression "the institution of an action or other legal proceeding" was so inapt to express the giving of a notice of appeal from a judgment in an action that the giving of the notice would not be covered by that expression. There is, however, high judicial authority that similar words in the Married Women's Property Act, 1893, do not bear the meaning contended for by the Crown. The language of s. 2 of the Act is as follows: "In any act or proceeding now or hereafter instituted by a woman." In *Hood Barrs* v. *Cathcart* (1) the Court of Appeal held that an appeal made by the defendant from an order in Chambers to the Divisional Court and afterwards to the Court of Appeal did not come within the language of the section as being a proceeding instituted. This decision was approved in the House of Lords in *Hood Barrs* v. *Heriot* (2), and in both cases language is used in the judgments given which appears to me to be quite general and directly applicable to the present case. In *Hood Barrs* v.

(1) [1894] 3 Ch. 376. (2) [1897] A. C. 177.

Heriot (1) Lord Herschell said: "The words 'in any action or proceeding instituted' refer I think to an action or some other litigation initiated by the married woman. Unless the proceeding is one which initiates litigation, it seems to me that it is not a proceeding within the true intent and meaning of the clause upon which reliance is placed." In *Hood Barrs* v. *Cathcart* (2) Davey L.J. said: "Now, I take it that the words 'action or proceeding' must mean some action, or some proceeding in the nature of an action; that is to say, a proceeding in which a lis is initiated; and it appears to me that 'instituted' would be an inapt word for any such proceeding as has been suggested by Mr. Hopkinson. I have never myself heard of an appeal being 'instituted,' and I do not suppose any one ever heard of such an expression being applied to an appeal; whereas 'instituted' is an apt word for the commencement of a suit." Though these decisions have reference to a different statute and may therefore be said not to be binding on this Court in the present case, the language used accords so entirely with my own view of the construction which should be placed upon the section now under discussion that I adopt it as applicable, and think that the contention on behalf of the Crown on the first point fails.

The second point, put shortly, is this: It is said that the expression "proceeding" includes a judgment, and that consequently the judgment appealed from and all proceedings leading up to it are avoided, and there is nothing, therefore, from which to appeal. There is no doubt that the expression "proceeding" is commonly interpreted as including a judgment given in the proceedings. For instance, judgments are set aside under Order LXX. of the Rules of the Supreme Court, which deals with the setting aside of proceedings for irregularity. To adopt such a construction in the present case would lead to a state of things which cannot possibly, I think, have been contemplated by the Legislature. To take one case only of civil proceedings, leaving criminal proceedings out of account altogether (although possibly more startling

(1) [1897] A. C. 179. (2) [1894] 3 Ch. 376, 380.

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results might be arrived at from adopting the construction on behalf of the Crown in relation to the latter than in relation to the former proceedings); assume a judgment obtained in an action to which the section applies to have been satisfied by payment. If the contention on behalf of the Crown is accepted the judgment is avoided, and as a result the judgment creditor must repay the amount which he has received under the judgment. This result is so startling that had sub-s. 1 stood alone I could not have construed "proceeding" in the latter part of the section as including a judgment obtained as a result of a proceeding. I think sub-s. 4 assists in clearing up the difficulty. This sub-section assumes that final judgments of the classes specified in the sub-section are subsisting judgments, and it proceeds to lay down that nothing in sub-s. 1 shall operate to prevent them being not only subsisting but enforceable judgments. Some provision of this kind was necessary, otherwise it might have been said that to sue out a writ of fi. fa., or to institute bankruptcy proceedings on a final judgment, was the institution of a legal proceeding, and therefore not permissible under sub-s. 1. If final judgments which are either unappealable or not under appeal are treated by sub-s. 4 as subsisting judgments in spite of the provisions of sub-s. 1, what is there in the Act to suggest that a final judgment which is under appeal is therefore avoided? I can see nothing. I consider, therefore, that the suppliants' right of appeal is not interfered with by the Indemnity Act, 1920, and this Court is not only entitled but is bound to rehear the case.

The other point on the Act relates not to the competence of the Court to entertain the appeal but to its jurisdiction. The contention is that the suppliants' claim comes within s. 2, sub-s. 1 (*b*), and that consequently this Court cannot deal with the petition except by directing the assessment of compensation by the tribunal set up by the statute. This would, no doubt, be so, although the statute has been passed since the date of the judgment, if the suppliants' claim did fall within the sub-section: see *Quilter* v. *Mapleson* (1);

(1) 9 Q. B. D. 672.

Attorney-General v. *Birmingham Drainage Board* (1); *Stovin* v. *Fairbrass*. (2) In my opinion the claim is not within the section. The section is dealing with rights and not with procedure. If the suppliants had a right which they are entitled to enforce, notwithstanding the provisions of s. 1 of the statute, that right is not taken from them by the statute. Sect. 2 of the statute has, in my opinion, no application to any such right. The existence of the suppliants' right is to a certain extent admitted in the answer of the Attorney-General, and I shall presently deal with the exact nature of that right. I have already said that in my opinion the suppliants are, notwithstanding s. 1 of the statute, entitled to enforce any right they may have. For these reasons I think that the Indemnity Act, 1920, has no application to the present appeal and that this Court is entitled to deal with the appeal on its merits.

On the main question debated before the learned judge in the Court below, in reference to the question under which regulation the Minister acted, I entertain no doubt whatever. I think that the decision of Darling J. was clearly right both upon the facts and upon the language of the two regulations. Reg. 2 B deals with two quite separate matters, (*a*) the taking possession of goods by the authority, (*b*) the acquisition by the authority of goods, possession of which has been so taken. It is only in respect of goods "acquired" that a price has to be paid. Under this regulation possession may be taken by notice. It is obvious that under this regulation the taking possession of goods need not necessarily be followed by any acquisition of them. On the other hand, the taking possession and the acquisition may both take place at the same time. It was only at a somewhat late stage and after reg. 2 F had been some time in force that the powers under reg. 2 B were conferred upon the Food Controller. Reg. 2 F, in my opinion, contemplates an entirely different procedure from that prescribed in reg. 2 B. Reg. 2 F is confined to the making of "orders," and "orders" within the meaning of the regulations

(1) [1912] A. C. 788. (2) 88 L. J. (K. B.) 1004.

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appear to be something much more formal than and very different to the notices prescribed by reg. 2 B: see reg. 60.

On January 21, 1918, the Food Controller issued what is called an order, 1918, No. 58, but what is in fact partly an order and partly a notice; clause 1 being a notice under reg. 2 B and clause 2 an order under reg. 2 F. The notice applied to the suppliants' goods; the order did not. Upon this ground alone I should be prepared to uphold the learned judge's decision on this point. When the facts are looked into it is plain that there is no ground for contending either that the Food Controller purported to deal with these goods under reg. 2 F or that the suppliants ever thought that he was so dealing with them. The correspondence is quite clear upon the point. On February 18 the suppliants supplied particulars of all their stocks, as required by the notice issued under reg. 2 B. The bran and pollards were inspected by the officials of the Ministry, and on March 16 the Director of Feeding Stuffs intimated his willingness to pay and the price he was prepared to pay. He must, by intimating that he was prepared to pay the price, be taken to have "acquired" the goods by this date. The Director affirms this on April 5. The suppliants, recognizing the position, acted as they might have been expected to act in such a matter. While reserving all their rights, they were anxious to give the authorities as little trouble as possible. As a result the letter of April 20 is written, in which the writer says: "You may please accept this letter as placing at your disposal the quantities mentioned, and Messrs. Robinson will deliver to any instructions issued by you." It was only because the Director acted upon this very proper intimation and sent instructions for small deliveries as and when required that the slender foundation can be found for the suggestion that the Director was putting into operation the powers conferred upon him by reg. 2 F. The facts do not warrant the contention.

In my opinion there is no ground for holding that reg. 2 B is ultra vires. On this point reference was made to the

judgment of Salter J. in *Newcastle Breweries* v. *The King* (1) and to the comment of Greer J. upon that case in *Hudson's Bay Co.* v. *Maclay*. (2) The validity of reg. 2 B was directly challenged in the case before Salter J. and he held it ultra vires. The facts in that case were different to those in the present one. In that case the regulation gave the tribunal power to fix different prices for goods from those contained in the schedule to a previous Act of Parliament, and the learned judge really founded his judgment upon that fact. It will be time enough to express an opinion upon that point should it ever come before this Court. If and so far as the learned judge expressed the view that, on general grounds and apart from the above special consideration, the regulation was ultra vires, I say with all respect that I do not agree with him or with the comment of Lord Dunedin on the case as reported in the *De Keyser's Hotel Case*. (3) I prefer the reasoning and conclusion of Greer J. in the *Hudson's Bay Co.'s Case* (2), where he points out why he disagrees with the view of Salter J. So far as the present case is concerned, the authority of the Food Controller is contained in s. 4 of the New Ministries and Secretaries Act, 1916. His duty is there declared to be to regulate the supply and consumption of food in such manner as he thinks best for maintaining a proper supply of food, and for this purpose he shall have (inter alia) such powers as may be conferred on him by regulations under the Defence of the Realm Consolidation Act, 1914, which regulations may be made under that Act accordingly. I do not understand that the authority of the Food Controller to fix maximum prices under reg. 2 F is challenged or that any complaint is made as to the validity of that regulation. If so I cannot follow the contention that the provision as to prices contained in 2 B is ultra vires. In my opinion there is no ground for challenging the validity of the regulation. Down to this point I am agreeing with the view expressed by Darling J.

A serious question was raised in this Court in reference

(1) [1920] 1 K. B. 854. (2) 36 Times L. R. 469, 478.
(3) [1920] A. C. 508, 529.

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to the tribunal mentioned in reg. 2 B, which does not appear to have been brought to the attention of the learned judge. The regulation provides that the price to be paid for goods acquired under the regulation shall, in default of agreement, be determined by the tribunal by which "claims for compensation under these regulations are . . . . determined." It was not disputed by counsel for the Crown that "are determined" means are in fact determined. It was contended for the suppliants that the only tribunal in existence to which the regulation could apply was the Commissioners appointed by the Royal Warrant of March 31, 1915, and that this body had from the first refused to entertain any claims in which any statutory or contractual right to payment or compensation existed or was alleged, and had in fact refused to entertain the suppliants' claim. This was not disputed by counsel for the Crown, but it was said that the Commissioners are the tribunal indicated by the regulation, because they do deal with numbers of claims arising under the regulation, and that if they refused to entertain claims which come within the terms of the reference to them they could by proper means have been compelled to entertain them. I cannot accept this argument. I do not give any decision upon the question whether any machinery exists by which the Commissioners could have been compelled to deal with cases like the present. It is sufficient for me that they never have done so, and refused to do so in the present case. That fact brings this case, in my opinion, within the rule referred to by Lord Atkinson in the *Cannon Brewery Case* (1) and his comment on it: "That canon is this: that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms. I used the words 'legal right to compensation' advisedly, as I think these authorities establish that, in the absence of unequivocal language confining the compensation payable to the subject to a sum given ex gratia, it cannot be so

(1) [1919] A. C. 744, 752.

confined. I do not think that the Attorney-General really contested this, nor, as I understood him, did he contest the principle that where the statute authorizing the taking away of, or causing damage to, the subject's property, either does not provide a special tribunal to assess the amount of the compensation the subject is to receive, or only provides a tribunal which has become non-existent, the subject is entitled to have that amount assessed in the High Court of Justice." For all practical purposes the Commissioners were a non-existent tribunal so far as the claims of the suppliants are concerned. I come therefore to the conclusion that the suppliants have a legal claim to compensation, the amount of which claim must be ascertained in accordance with the directions laid down in reg. 2 B for determining prices, and that inasmuch as the tribunal referred to in the regulation did not determine claims such as theirs the suppliants are not debarred from seeking to have the amount of their claim ascertained in the High Court, and that having established their legal right to be paid, and no agreement having been come to as to the amount to which they are entitled, they have established their right to an account at their own risk as to costs. The order of this Court will therefore be that the appeal is allowed with costs here and below, and an order made that the suppliants are entitled to be paid for 677 tons of bran and 251 tons of pollards referred to in the petition of right, prices to be determined in accordance with the directions laid down in reg. 2 B, and to an account of what is due to them ascertained as aforesaid.

SCRUTTON L.J. In a case where by petition of right dated October 24, 1918, the claimant asks for compensation for the price of goods taken from him by the Food Controller during the war under the powers of the Defence of the Realm Regulations, the petitioner appeals against a judgment of Darling J. dated July 7, 1920, refusing him relief. A preliminary objection is taken by counsel for the Crown that all further legal proceedings on the petition have been

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stayed since August 16, 1920, by the Indemnity Act, 1920, which came into force on that day.

Periods of public disturbance, when executive officers may in good faith, and believing that they are acting in the public interest, interfere with ordinary legal rights of citizens, are generally followed by Acts of Indemnity protecting such public officers. The Indemnity Act, 1920, is of this nature and, as its full title shows, was intended to take away certain legal remedies and substitute others. The first part of s. 1 forbids the institution of any fresh proceedings, including petitions of right, in respect of acts done in good faith and purported exercise of duty by a servant of the Crown. The acts complained of in this petition are alleged by the suppliants to have been done by the Food Controller purporting to act under the Defence of the Realm Regulations. The burden of proving lack of good faith is on the suppliants, who offer no evidence on the subject. This petition, therefore, could not have been presented after August 16, 1920.

The next question is as to the position of such proceedings instituted before August 16, 1920; and on this the statute provides that they shall be discharged and made void, subject to the power of the Court to make orders as to costs. It appears to be admitted that if the proceeding has not resulted in a judgment before August 16, 1920, it cannot be continued after that date. In my view the result of the first sub-section clearly is that all proceedings including judgment in such an action or petition of right are discharged and made void. If you discharge and make void an action you annul all proceedings in the action, including the judgment or an appeal against the judgment, which appeal is a rehearing of the action. But the question appears to have been raised in the Legislature as to the position of judgments, and s. 1, sub-s. 4, gives the result. A judgment given, against which there can be no appeal and which is therefore final, or a judgment against which at the passing of this Act there is in fact no appeal, can be enforced in spite of the provisions of the earlier part of the

section which otherwise would prevent such proceedings in an action thereby "discharged and rendered void." Any other judgment which at the passing of this Act was by law not final and had in fact been challenged was in my view clearly "discharged and rendered void."

The person aggrieved was given a substituted remedy on terms and before a tribunal stated at length in s. 2 of the Act, which tribunal was to act on principles laid down in the Act. I understood that it was suggested that a right of appeal in the King's Courts against their judgments should not be taken away without clear words, and that the statute was not clear. I should have thought that "to discharge and make void an action" clearly nullified all proceedings in the action, including judgment therein, and that when Parliament expressly excepted from this provision some kinds of judgment it left other kinds of judgments —namely, those which had in fact been challenged at the passing of the Act and which could in law be challenged, under the original nullification. To hold they are still valid appears to me to be legislating by repealing the Act, not interpreting its words. The appeal which we are asked to hear is a rehearing of a petition of right which has been discharged and avoided by statute, and I am quite unable to see how we can give another judgment on a void petition. The Act intended to restrict legal proceedings and substitute other remedies. In my view s. 1, sub-s. 1, with the exception expressly made by sub-s. 4, which does not cover the present case, invalidates these proceedings. Sect. 2 does not, in my view, add to the force of the invalidation but renders it less onerous by supplying an alternative remedy. I do not think that appealing against a judgment is instituting a proceeding, but that the appeal is the rehearing of a petition which has by statute been declared null and void. For these reasons I am of opinion that the preliminary objection succeeds and that we are prohibited by statute from rehearing a void petition of right which has been discharged and from giving judgment thereon.

Holding this view, I do not propose to go at length into

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the position if we could hear the appeal, but to state shortly my views as to the result. I do not think the Government officials clearly understood whether they were acting under reg. 2 B or reg. 2 F; but when on January 21, 1918, the Food Controller gave notice that he took possession of all cattle feeding stuffs in the United Kingdom, which notice made it an offence for the suppliants to sell or remove it, he did an act which entitled the suppliants to compensation under reg. 2 B and on the terms thereof, and when, without making it clear whether he was buying himself or ordering the suppliants to sell to some one else, he gave directions in language apparently taken from 2 F he was, I think, "acquiring" under 2 B and liable to pay a price not exceeding the maximum price already fixed. As stated in the *Cannon Brewery Case* (1), the suppliants had a legal right to compensation, that is by petition of right, in the ordinary Courts. I do not regard the obscure words about the tribunal in reg. 2 B as excluding this right. It was a legal right, and the Defence of the Realm Losses Commission, at that time existing without statutory authority, refused to hear any claim based on legal right. Claims so based were not at the material time being determined by that Commission; in consequence, in my view, there was in reg. 2 B no effective identification of an exclusive tribunal. As the provision about the tribunal in reg. 2 B was ineffective it is unnecessary to consider whether it was ultra vires. I see no reason for holding the provisions for fixing price to be ultra vires. I take the view that the Indemnity Act, 1920, does effectively identify an exclusive tribunal, but on the alternative view that it does not this Court has to determine whether the suppliants have been paid the proper compensation under reg. 2 B not exceeding the maximum price fixed by regulation. Darling J. has given judgment against the suppliants, while expressly saying that he does not know whether they have been paid enough under the regulation, on the ground that this can be adjusted. I do not understand this view. The maximum price is, under clause 7

(1) [1919] A. C. 744.

of the order of November 1, 1917, to be paid fourteen days after the date of delivery, with interest if unpaid not exceeding 6 per cent. What amount is due under this provision has never been ascertained, and the exact legal position of the Controller from the time he gave notice that he took possession to the time when the goods were dispatched from the warehouse by his instructions has never been considered; it may affect compensation or rent for storage and the date when the goods should be paid for with the consequent right to interest. The same consideration affects the question whether the maximum price should be lessened by the deduction of the 6*s*. 3*d*. mentioned in clause 2 of the order of November, 1917. Darling J. has said no without any reasons, apparently on the ground that the sale is to the Food Controller, who is not a dealer. But if this is so, of which I have considerable doubt, the question when the sale took place will affect any claim for interest on the maximum price. Deliveries of two-ton lots only also add to the maximum price 5*s*. a ton under clause 3 of the same order; this again depends on to whom the sale is in law made. Finally, the suppliants have apparently received payment on an excessive weight. What may be the result of this this Court cannot ascertain. If an appeal lies, contrary to my opinion, I think the judgment of Darling J. should be set aside and the petition remitted for hearing to the King's Bench Division, to ascertain whether the suppliants are entitled under reg. 2 B and its terms to any more compensation than they have in fact received, and that the costs of these proceedings be reserved till it is known whether they have or have not already been paid sufficient compensation. If they have, I see no sufficient importance in the principles discussed to justify these proceedings. But, as I have said, in my view this appeal should be dismissed, as the proceedings in which it is taken have been discharged and avoided by statute, and as the suppliants have insisted on its being heard they should pay the costs of the appeal, and neither side should have any costs of the proceedings before August 16, 1920.

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ATKIN L.J. (1) The suppliants by petition of right dated October 24, 1918, claim compensation in respect of certain quantities of bran and pollards acquired from them by the Food Controller in pursuance of his powers under the Defence of the Realm Regulations. The petition was heard on July 7, 1920, before Darling J., who ordered judgment to be entered for the Crown, being of opinion that the sole tribunal having jurisdiction to determine the amount of the compensation due to the suppliants was the Defence of the Realm Losses Commission. On July 22, 1920, the suppliants gave notice of appeal to this Court, the right of appeal being derived from s. 7 of the Petitions of Right Act, 1860. On August 16, 1920, the Indemnity Act, 1920, received the Royal Assent.

Upon the opening of the appeal a preliminary objection was taken on the part of the Crown to the effect that the suppliants' appeal was discharged and made void by the Indemnity Act, 1920. It is therefore necessary to consider whether this objection is well founded. That the suppliants at the time of the passing of the Act had vested in them a statutory right of appeal to this Court cannot be disputed. I approach the construction of the Act, having in view the two principles of construction that on the one hand you are to give effect to the ordinary and natural sense of the words used, on the other hand that it requires clear and express language in a statute to take away a right of recourse to His Majesty's Courts of Justice. I know no better expression of the latter principle than is to be found in the language of Scrutton J. in the Court of Appeal in *In re Boaler* (2): "One of the valuable rights of every subject of the King is to appeal to the King in his Courts if he alleges that a civil wrong has been done to him, or if he alleges that a wrong punishable criminally has been done to him, or has been committed by another subject of the King. This right is sometimes abused, and it is, of course, quite competent to Parliament to deprive

(1) The judgment of Atkin L.J. was read by Bankes L.J.
(2) [1915] 1 K. B. 21, 36.

any subject of the King of it either absolutely or in part. But the language of any such statute should be jealously watched by the Courts, and should not be extended beyond its least onerous meaning unless clear words are used to justify such extension." So per Lord Campbell in *Balfour* v. *Malcolm* (1): "There can be no doubt that the principle is, that the jurisdiction of the Supreme Courts can only be taken away by positive and clear enactments in an Act of Parliament." In that case the clear words were found. Moreover, if the words are not clear the Court is bound in order to determine the meaning to consider the context and, among other considerations, to have regard to suggestions that one or other of the possible meanings leads to unreasonable or absurd results. It is unnecessary to read the section at length. The contention on behalf of the Crown was that by giving notice of appeal the suppliants instituted proceedings in the Court of Appeal, the second branch of the Supreme Court of Judicature. Alternatively it was said that the appeal was part of the original proceedings instituted by the suppliants on October 24, 1918, by petition of right, and that by the Act the whole of the proceedings, including the judgment for the Crown, were discharged and made void, leaving the suppliants at liberty to institute proceedings under s. 2 of the Act before the Defence of the Realm Losses Commission. As to the first point, it has been decided by members of the Court of Appeal and the House of Lords that the words "institute proceedings" are not apt words to describe bringing an appeal. See *Hood Barrs* v. *Cathcart* (2) and *Hood Barrs* v. *Heriot* (3), cases dealing with s. 2 of the Married Women's Property Act, 1893. "I do not think the language of the section is large enough to hit such a case as the present. An appeal is not a 'proceeding instituted' as the expression is understood by lawyers": per Lindley L.J. (4) "It must be borne in mind that an appeal is in reality in the nature of a defence by the person against whom an order has been

(1) (1842) 8 Cl. & F. 485, 500.
(2) [1894] 3 Ch. 376.
(3) [1897] A. C. 177.
(4) [1894] 3 Ch. 379.

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made . . . . and it appears to me that 'instituted' would be an inapt word for any such proceeding as has been suggested. . . . . I have never myself heard of an appeal being 'instituted,' and I do not suppose any one ever heard of such an expression being applied to an appeal": per Davey L.J. (1) "If we were to hold that an appeal presented by a married woman is a 'proceeding instituted' by her, then I do not think it would be possible to avoid holding that any proceeding taken by a married woman in the course of an action against her would be a proceeding within the meaning of the section. The Court . . . . would have jurisdiction . . . . to deal separately and independently with the costs of each of those 'proceedings' under the section. I do not think that was ever intended, nor do I think that the words which the Legislature has employed are apt to give the Court any such jurisdiction. . . . . Unless the proceeding is one which initiates litigation, it seems to me that it is not a proceeding within the true intent and meaning of the clause upon which reliance is placed": per Lord Herschell. (2) I do not think that I should be right in holding that the language which Lord Lindley, Lord Davey and Lord Herschell more than twenty years ago declared to be inapt for the purpose is clear enough to take away a vested right of appeal. I will say something as to the results of such a contention in dealing with the alternative way in which the Crown put the case.

The further contention of the Crown is that the proceeding instituted by the petition of right, including the judgment entered for the Crown on July 7, 1920, was discharged and made void by s. 1, sub-s. 1, of the Indemnity Act, 1920, and that either the appeal is a part of those proceedings, and therefore included in the general destruction, or is an appeal from a judgment already discharged and made void, and therefore is a nullity. It appears to me that the words of the section make it reasonably plain that the intention of the statute was not to avoid judgments already given at the date of the passing of the Act. The

(1) [1894] 3 Ch. 380. (2) [1897] A. C. 179.

only saving clause relating to judgments is to be found in s. 1, sub-s. 4: "Nothing in this section shall prejudice or prevent the institution or prosecution of proceedings for giving effect to a final judgment given before the passing of this Act by any Court of final resort or by any other Court where the judgment at the passing of this Act is not then the subject of a pending appeal." It will be noticed that this sub-section does not affirmatively except or affirm judgments at all. It is directed to proceedings to give effect to judgments, proceedings taken to secure execution or equitable execution, attachment of debts, bankruptcy notices, and the like. If the judgments therein mentioned would otherwise have been discharged and made void by sub-s. 1 it seems the oddest way of exempting them from dissolution to enact a cautionary clause that nothing shall prevent proceedings that give effect to them. What is to happen to them apart from proceedings that give effect to them? Does the judgment debt constitute a debt? Can it be pleaded or otherwise be made available as a set-off? Can it be proved in bankruptcy? None of these rights are covered by a saving that only affects proceedings. Moreover, the clause saves proceedings to give effect to a judgment which is at the passing of the Act the subject of a pending appeal. Does the saving disappear when the appeal ceases to pend and, if not, what words have saved it? And how can an appeal continue to pend if by the previous section the judgment had been already discharged and made void? I think it is possible that the negative words in sub-s. 4 should be interpreted as being affirmative in respect of judgments then the subject of a pending appeal; that is they should be read as amounting to a statutory stay of proceedings to give effect to judgments while an appeal pending at the passing of the Act is not yet determined, but it seems unnecessary to finally decide this. But the results that would follow from the construction put upon the section are so remarkable that if the express words were far stronger the contention would still be difficult to accept. Let us assume that every judgment is discharged and made

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void except a judgment already given by any Court of final resort or the subject of a pending appeal. The Act applies to criminal proceedings. I will not consider the effect upon a verdict of acquittal, but if a conviction and sentence are discharged and made void by statute has not the accused been illegally detained if sentenced to imprisonment? And if fined can he recover the fine? Secondly, in civil proceedings it would appear to follow that a judgment for the defendant would be discharged, and none the less so though it had been given originally in the county court, affirmed by the High Court and the Court of Appeal. The persistent plaintiff in cases within s. 2 could begin all over again before the Defence of the Realm Losses Commission. So if the plaintiff had been successful up to the Court of Appeal he must begin again before the Losses Commission. If the judgment has resulted in a money payment, has the money to be repaid, even if the sum represents costs paid to the successful defendant? Would bankruptcy proceedings taken on such a judgment be invalidated? If the proceedings have resulted in a judgment, the time for appealing from which has not expired at the date of the passing of the Act, the judgment debtor may enforce his judgment if he has only not given his notice before August 16, 1920. Thus judgment in the High Court on July 20; notice of appeal July 20; proceedings discharged. But if notice of appeal is given on August 20, the judgment creditor may enforce his judgment and presumably the judgment debtor may appeal; so that in an Act to relieve persons from the liability for acts done in good faith the more prompt such a person is in appealing the worse for him. Moreover the discharge of proceedings only takes place if the act complained of is done in good faith. If the case has not proceeded to judgment this issue if raised can be determined on the trial. But if the case has been determined by a judgment how is this issue to be disposed of in the Court of Appeal? In nearly all the proceedings which are aimed at by s. 1, contract, trespass to person, trespass to goods, false imprisonment, good faith

is irrelevant to the cause of action, and evidence will not have been directed to that topic. How is it proposed that the Court of Appeal or the House of Lords shall determine the issue whether the defendant has acted in good faith, whether one assumes that the onus is upon the plaintiff or the defendant? It was suggested in argument that, while the construction contended for might in theory lead to the odd results just enumerated, the Legislature may be presumed to have catalogued and passed in review all the cases to which the Act might apply retrospectively and to be satisfied that there were none in fact which would be so affected. I cannot think such a presumption possible, or to be relevant on a question of construction even if proved. I further notice that the Act might by Order in Council be applied to any part of His Majesty's Dominions, except the self-governing Dominions, so that it may become of very general application; and though it may be so applied "subject to such modifications and exceptions as may appear to His Majesty necessary for adapting this Act to the circumstances of that part," I venture to doubt whether it was contemplated that such modifications would extend to such substantial provisions as those relating to the validity or otherwise of existing judgments.

For the reasons I have given above I come to the conclusion that the words of the statute do not affect proceedings which have resulted in a final judgment given before the statute was passed. The preliminary objection therefore fails.

On the point under appeal I agree with the other members of the Court. It appears to me that the Food Controller acted in pursuance of reg. 2 B and not 2 F, and that the goods were acquired by the Food Controller under the terms of the former regulation. Whether the Food Controller, acting under that regulation, had the legal right to demand of the suppliants that they should deliver the goods in the manner and at the times in fact demanded it is unnecessary to determine. The suppliants in fact assented to his demands. I think myself that the operation of 2 F

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is negatived by the fact that the Food Controller never by order required the suppliants to place the food at his disposal. An "order" as used in this regulation means something different to a letter. I also agree that even if the Food Controller acted under 2 F the maximum price fixed by the Controller would have to be taken into account in assessing compensation. The suppliants, however, are entitled to have the price of the goods assessed, and inasmuch as the Act does not apply to this petition of right for the reasons already given, the suppliants are entitled to have the judgment set aside and the true compensation assessed.

Appeal allowed.

Solicitors for appellants: *Stow, Preston & Littelton.*
Solicitor for the Crown: *E. P. Lickfold.*

NOTE.

Indemnity Act, 1920 (10 & 11 Geo. 5, c. 48): An Act to restrict the taking of legal proceedings in respect of certain acts and matters done during the war, and provide in certain cases remedies in substitution therefor, and to validate certain proclamations, orders, licences, ordinances, and other laws issued, made, and passed, and sentences, judgments, and orders of certain courts given and made during the war.

Sect. 1, sub-s. 1: "No action or other legal proceeding whatsoever, whether civil or criminal, shall be instituted in any court of law for or on account of or in respect of any act, matter or thing done, whether within or without His Majesty's dominions, during the war before the passing of this Act, if done in good faith, and done or purported to be done in the execution of his duty or for the defence of the realm or the public safety, or for the enforcement of discipline, or otherwise in the public interest, by a person holding office under or employed in the service of the Crown in any capacity, whether naval, military, air-force, or civil, or by any other person acting under the authority of a person so holding office and so employed; and, if any such proceeding has been instituted whether before or after the passing of this Act, it shall be discharged and made void, subject in the case of a proceeding instituted before the twentieth day of July, 1920, to such order as to costs as the Court or a judge thereof may think fit to make. . . ."

Sub-s. 2: "For the purposes of this section, a petition of right shall be deemed to be a legal proceeding, and the proceeding shall be deemed to be instituted at the date on which the petition is presented. . . ."

Sub-s. 4: "Nothing in this section shall prejudice or prevent the institution

or prosecution of proceedings for giving effect to a final judgment given before the passing of this Act by any Court of final resort or by any other Court where the judgment at the passing of this Act is not then the subject of a pending appeal."

Sect. 2, sub-s. 1: "Notwithstanding anything in the foregoing section restricting the right of taking legal proceedings, any person not being a subject of a state which has been at war with His Majesty during the war and not having been a subject of such a state whilst that state was so at war with His Majesty—

(*a*) being the owner of a ship or vessel . . . . requisitioned" . . . . [shall be entitled to compensation for services and loss or damage]; "or

(*b*) who has otherwise incurred or sustained any direct loss or damage by reason of interference with his property or business in the United Kingdom through the exercise or purported exercise, during the war, of any prerogative right of His Majesty or of any power under any enactment relating to the defence of the realm, or any regulation or order made or purporting to be made thereunder, shall be entitled to payment or compensation in respect of such loss or damage;

and such payment or compensation shall be assessed on the principles and by the tribunal hereinafter mentioned, and the decision of that tribunal shall be final: . . . ."

Sub-s. 2: "The payment or compensation shall be assessed in accordance with the following principles:—

(i.) Where under any regulation or order made or purporting to be made under any enactment relating to the defence of the realm, any special principle for assessment of any payment (including any price to be paid) or compensation or the rate thereof, is contained in the regulation or order, such payment or compensation shall be assessed in accordance with that principle or rate. . . . .

(ii.) Where the payment or compensation is claimed under sub-s. 1 (*a*) of this section, it shall be assessed . . . . [as therein mentioned].

(iii.) In any other case compensation shall be assessed as follows:—

(*a*) If the claimant would, apart from this Act, have had a legal right to compensation, the tribunal shall give effect to that right. . . . .

(*b*) If the claimant would not have had any such legal right, the compensation shall be assessed in accordance with the principles upon which the Commission appointed by His Majesty under Commissions dated March 31, 1915, and December 18, 1918 (commonly known as the Defence of the Realm Losses Commission), has hitherto acted in cases where no special provision is made as to the assessment of compensation, which principles are set forth in Part II. of the Schedule to this Act. . . . ."

Sub-s. 4: "The tribunal for assessing payment or compensation shall, where by any of the Defence of the Realm Regulations any special tribunal is prescribed, be that tribunal, and in cases where the claim is made under sub-s. 1 (*a*) of this section be the said Board of Arbitration, and in any other case be the said Defence of the Realm Losses Commission."

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Defence of the Realm Regulations, June, 1917.

2 B: "It shall be lawful for the Admiralty or Army Council or the Minister of Munitions to take possession of any war material, food, forage and stores of any description and of any articles required for or in connection with the production thereof.

"Where any goods, possession of which has been so taken, are acquired by the Admiralty or Army Council or the Minister of Munitions, the price to be paid in respect thereof shall in default of agreement be determined by the tribunal by which claims for compensation under these regulations are, in the absence of any express provision to the contrary, determined.

"In determining such price regard need not be had to the market price but shall be had— . . . .

"(*b*) if the goods are acquired from any person other than the grower or producer thereof, to the price paid by such person for the goods and to whether such price was unreasonable or excessive, and to the rate of profit usually earned in respect of the sale of similar goods before the war, and to whether such rate or profit was unreasonable or excessive, and to any other circumstances of the case; so, however, that if the person from whom the goods are acquired himself acquired the goods otherwise than in the usual course of his business, no allowance, or an allowance at a reduced rate, on account of profit shall be made:

"Provided that where by virtue of these regulations or any order made thereunder the sale of the goods at a price above any price fixed thereunder is prohibited the price assessed under this regulation shall not exceed the price so fixed. . . . .

"The Food Controller may, as respects articles to which his powers under Regulations 2 F to 2 J extend, exercise the like powers as are by this regulation conferred on the Admiralty, Army Council, and Minister of Munitions."

2 F—(1.) "The Food Controller may make orders regulating, or giving directions with respect to the production, manufacture, treatment, use, consumption, transport, storage, distribution, supply, sale or purchase of, or other dealing in, or measures to be taken in relation to any article (including orders as to maximum and minimum price) where it appears to him necessary or expedient to make any such order for the purpose of encouraging or maintaining the food supply of the country, and making such provisions as to entry, inspection, or otherwise as appear to him necessary or expedient for the purpose of his duties.

(2.) "The Food Controller may by order require all or any persons owning or having power to sell or dispose of any article, or any stocks thereof, to place at the disposal of the Controller the article, or the whole or any part of the stocks thereof, as may be directed by the Controller, on such terms as he may direct, and to deliver to the Controller or to any person or persons named by him the article or stocks in such quantities and at such times as the Controller may require, where it appears to him necessary or expedient to make any such order for the purpose of encouraging or maintaining the food supply of the country.

"Such compensation shall be paid for any article or stock so requisitioned as shall, in default of agreement, be determined by the arbitration of a single arbitrator appointed in manner provided by the order; but in determining

the amount of the compensation the arbitrator shall have regard to the cost of production of the article and to the allowance of a reasonable profit, without necessarily taking into consideration the market price of the article at the time." . . . .

By the Cattle Feeding Stuffs (Requisition) Order, 1918 (Statutory Rules and Orders, 1918, No. 58), dated January 21, 1918, and made under the Defence of the Realm Regulations the Food Controller ordered as follows:—

1. (*a*) "In pursuance of Regulation 2 B of the Defence of the Realm Regulations, the Food Controller gives notice that he hereby takes possession of all cattle feeding stuffs which are in the United Kingdom on January 22, 1918, and are not already in his possession under or by reason of any previous order. . . . .

2. (*a*) "In pursuance of Regulation 2 F of the Defence of the Realm Regulations, the Food Controller requires all persons owning or having power to sell or dispose of any cattle feeding stuffs which may arrive in the United Kingdom after January 21, 1918, to place the same at the disposal of the Food Controller and deliver the same to him or to his order. . . . ."

By the Cattle Feeding Stuffs (Maximum Prices) Order, 1918 (Statutory Rules and Orders, 1918, No. 173), dated February 7, 1918, and made under the Defence of the Realm Regulations, the Food Controller ordered that except under the authority of the Food Controller no cattle feeding stuffs of any of the varieties specified in the schedule to the order should be sold at a price exceeding the maximum price applicable thereto according to the schedule.

W. H. G.

NEILSON *v.* LONDON AND NORTH WESTERN RAILWAY.

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May 25.

Railway Company—Contract of Carriage—Owner's Risk Note—Construction.

The plaintiff delivered a number of packages to the defendants for carriage from L. to B. via M. on the terms of an owner's risk note, which provided that the defendants were not to be liable for "delay . . . during any portion of the transit . . . except upon proof that such . . . delay arose from the wilful misconduct of the company's servants." By the contract the plaintiff was entitled to the exclusive use of a truck for the carriage of his goods to B. The packages as delivered to the defendants were not addressed or labelled to B., but had on them old labels bearing the names of various stations in different parts of the country. The packages were put in the truck reserved for the plaintiff and despatched from L., there being attached to the truck some labels indicating B. as the destination. By the time the truck arrived at M. the labels had become detached, and the defendants' official at that station, who had been advised that the truck was on the train, but had forgotten all about it, negligently took the truck off, and not knowing that the plaintiff's packages were destined for B., sent them to the places respectively specified on the old labels which they bore, with the result that their delivery was delayed:—

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Held, that as the defendant's servant intentionally sent the goods to places which were in fact not upon the contract route, the delay did not occur "during any portion of the transit" within the meaning of the consignment note, and that it made no difference in that respect that his intention in so sending them was the result of an honest mistake; the defendants were consequently not relieved from liability by the terms of the contract.

Foster v. *Great Western Ry. Co.* [1904] 2 K. B. 306 distinguished.

APPEAL from the Bloomsbury County Court.

The plaintiff, who was the manager of a touring theatrical company, entered into a contract with the defendants for the carriage of his company and their theatrical properties from Llandudno to Bolton. For that purpose he signed one of the defendants' forms which was headed "Theatrical Companies. Combined form of application for tickets at reduced rates and Consignment Note for conveyance of scenery and luggage at Owner's Risk." The form contained the following clauses: "I also request you to carry the personal luggage, costumes, scenery and other usual equipment belonging to or used by the company above mentioned or by the members thereof at the owner's risk on the terms and conditions allowed to such companies shown below and on back hereof." "In consideration of your doing so I agree . . . . to relieve you from all liability for loss, damage, misconveyance, misdelivery, delay, or detention of or to such goods (during any portion of the transit or while left in your possession to be stored) . . . except upon proof that such loss, damage, misconveyance, misdelivery, delay, or detention arose from the wilful misconduct of the Company's servants." The plaintiff took thirteen passenger tickets for the members of his company, and by the terms of the contract stated on the application form when the number of passengers in the party exceeded ten they were entitled to one truck free at owner's risk. Among the conditions on the back of the form was the following: "Cond. 10. The company will not be liable for . . . . (*b*) loss or delay due to inadequate or incorrect address or imperfect labelling." The plaintiff delivered to the defendants at Llandudno fifteen packages of properties to be carried under the contract, and the defendants put them

in a covered van, which had the words "Through to Bolton" marked on it in chalk and also written on some labels which were tied on to it. As the plaintiff was entitled to the exclusive use of the van it was not thought necessary to address or label the separate packages. None of those packages were addressed to Bolton. Some had no labels on at all, while others bore old labels for carriage to Bath, Scarborough or Newcastle. The route from Llandudno to Bolton goes through Chester and Manchester. The defendants' inspector at Manchester was duly advised by telegram that there was a van for Bolton on the train, but unfortunately he misread the telegram and then put it in his pocket and forgot all about it. Before the train reached Manchester the tie-on labels showing that the van was for Bolton had by some means got detached, and on its arrival at Manchester the defendants' inspector, not observing the chalk mark and not knowing the destination of the van, by mistake took it off the train and removed the plaintiff's packages. Those which bore no address he put into the cloakroom, and those which bore old labels he sent off to the destinations thereby respectively indicated, some to Bath, some to Scarborough and others to Newcastle. The result was that the delivery of the packages at Bolton was delayed for some two days, whereby the plaintiff who had advertised a performance for the day succeeding that of his arrival at Bolton was unable to give it.

The plaintiff brought this action for damages for delay in delivery, and contended that the defendants were not excused by the provisions of the owner's risk note, as those provisions only applied where the delay occurred during a portion of the agreed transit, whereas here the delay was caused by the packages being sent on wholly different routes. The county court judge found that the inspector at Manchester blundered honestly and did not act wilfully or recklessly in doing what he did. He also held that there was no evidence of the labels having been wilfully detached, or of wilful misconduct in any other respect by the defendants' servants. He held that "the delay did not originate whilst the goods were being

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carried on a substituted route or by a substituted method of conveyance but in a mistake, or in mistakes, made at or before Manchester, whilst the contract was being performed in the stipulated manner." He accordingly gave judgment for the defendants.

The plaintiff appealed.

Elkin for the plaintiff. The defendants cannot rely upon the terms of the consignment note as affording a defence unless they can establish that the delay complained of occurred "during a portion of the transit," by which is to be understood the transit contracted for. Here the transit contracted for was from Llandudno to Bolton, and the delay did not occur during that transit, but whilst the goods were travelling to places never contemplated by the parties to the contract. In *Mallet* v. *Great Eastern Ry. Co.* (1) fish was delivered at Lowestoft to the defendants to be carried on their railway to London and thence by the Great Western via Weymouth to Jersey on the terms of an owner's risk note, whereby the defendants were not to be liable for delay unless it arose from wilful misconduct of the defendants' servants. On the fish getting to London the defendants' servants by mistake forwarded it by the South Western via Southampton, whereby it arrived too late for the market in Jersey. It was held that the defendants were not relieved from liability by the condition of the consignment note, as the delay was not "a delay in the performance of the contract."

In *Gunyon* v. *South Eastern and Chatham Ry. Co.* (2) the plaintiff delivered fruit to the defendants to be carried by passenger train from Sittingbourne to Glasgow on the terms of a similar owner's risk note. The fruit was sent from the departure station in a passenger train, but in the course of the journey it was transferred to a goods train, whereby its arrival at Glasgow was delayed. It was held that as the carriage of the fruit by passenger train was of the essence of the contract the provisions of the owner's risk note did not excuse the delay. Those cases

(1) [1899] 1 Q. B. 309. (2) [1915] 2 K. B. 370.

show that if the delay is caused by the goods being carried on a different route or in a different conveyance from that contracted for the carrier cannot rely on the owner's risk note. Here the defendants both carried on different routes and in a different conveyance. The plaintiff was entitled to have the labelled van in which the packages were put go the whole way to Bolton, for the individual packages were, as the defendants knew, not labelled to Bolton, and the only security for their safe arrival was that they should be carried in that particular van to their destination. On both those grounds the defendants are disentitled to rely on the condition. The county court judge held that those cases did not apply and that he was bound by the decision in *Foster* v. *Great Western Ry. Co.* (1) In that case the plaintiff delivered fish to the defendants to be carried at owner's risk via Exeter and Southampton to Jersey. On reaching Exeter the fish ought to have been transferred to the Southampton train. By mistake it was left in the van and allowed to go on to Taunton. It was thereby delayed in delivery and the plaintiff suffered loss. The Court held the defendants were relieved from responsibility by the condition in the owner's risk note. That case may possibly be explained upon the ground that the defendants' act in sending the goods off the contract route was wholly unintentional. But if it cannot be distinguished from *Mallet's Case* (2) it is submitted that *Mallet's Case* (2) is to be preferred. Moreover, *Mallet's Case* (2) is agreeable with the decisions in two earlier cases : *Garnett* v. *Willan* (3) and *Sleat* v. *Fagg*. (4) In the former of those cases a parcel exceeding 5*l*. in value was delivered to the defendants, common carriers, to be carried from London to Worcester by their mail coach. The parcel was carried by the mail for part of the journey and then transferred into another coach belonging to different proprietors to be carried to its destination and was lost. The defendants had previously given notice that they would not be responsible for loss of a parcel which exceeded 5*l*. in value unless an insurance was

(1) [1904] 2 K. B. 306.
(2) [1899] 1 Q. B. 309.
(3) (1821) 5 B. & Al. 53.
(4) (1822) 5 B. & Al. 342.

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paid. The Court held that notwithstanding the notice the defendants were liable upon the ground that putting the parcel into a different coach when they knew it was to go by their own was a misfeasance and not mere negligence in the performance of their contract. In the latter case, *Sleat* v. *Fagg* (1), a parcel of banknotes was delivered to the defendant to be forwarded by mail coach. The defendant sent it by a different coach whereby it was exposed to greater risk. The defendant had given a similar notice to that in the preceding case. The parcel, which was not insured, was lost. The defendant was held liable, for the same reason as in *Garnett* v. *Willan*, that the defendant's act was one of misfeasance. So here the defendants were guilty of misfeasance in scattering the plaintiff's properties in different directions, for they knew that the proper destination was Bolton.

Beresford for the defendants. The county court judge, having found that the act of the defendants' servants in sending the plaintiff's goods to the places named on the old labels was the result of an honest mistake, was right in holding himself bound by *Foster's Case* to decide that the defendants were excused for the delay. Where a railway company, carrying on the terms of an owner's risk note, cause the goods entrusted to them for carriage by a defined route to deviate from that route, the test of their liability for any damage resulting from that deviation is whether when so causing it they were conscious that they were breaking their contract. It was because the defendants in *Foster's Case* were unconscious that they were breaking their contract in letting the fish go on to Taunton that they were held exempt. So here the inspector at Manchester was not conscious that in sending the plaintiff's goods to the places to which he did he was doing anything wrong; he intended by so doing to carry out what he mistakenly supposed the contract to be. This contention that the defendants are in the absence of intentional breach relieved from liability by the terms of the condition is not inconsistent with the presence in that condition of the words "during any portion of the transit." When dealing with the meaning

(1) (1822) 5 B. & Al. 342.

of those words one must consider not the place where the delay actually occurred but the place where the cause which gave rise to it happened. Now the cause of the delay was the inspector's blunder at Manchester; but Manchester was on the contract route, and consequently the delay was "during a portion of the transit" within the meaning of the condition. In *Foster* v. *Great Western Ry. Co.* (1), where the condition contained the same words "during any portion of the transit," Lord Alverstone said that the defendants "by some mistake, and from causes which do not prevent the condition being applicable, carried the goods on to Taunton, and therefore the breach of contract, in my opinion, occurred on the very route contemplated, namely, at Exeter." And Kennedy J. in that case also said: "Here the damage arose by reason of an error committed on the contract route." He distinguished *Mallet's Case* (2) on the ground that there the mistake was made before the transit had begun. He assumed that the waybill was wrongly filled up by the railway company at Lowestoft, and thought that if that were so it would make no difference that the fish was in fact carried over the contract route as far as London. He said: "No doubt in *Mallet's Case* (2) the goods were carried for some way over the same line of rails that they would have passed over if they had been duly sent off by the route agreed upon; but the intention in so carrying them was that the goods should travel, not by the route agreed upon, but by another route." If however *Mallet's Case* (2) is not distinguishable on that ground it is submitted that it was wrongly decided. Both Lord Alverstone and Kennedy J. in *Foster's Case* (1) expressed themselves in terms which showed plainly that in their opinion that was so.

[LUSH J. Is any special reliance placed on the use of the word "misconveyance" in this contract?]

Yes. It affords a further ground on which the Court should

(1) [1904] 2 K. B. 306, 309, 312.

(2) [1899] 1 Q. B. 309. Although the fact is not mentioned in the Law Reports the condition in *Mallet's Case*, as in the other cases, contained the words, "during any portion of the transit." See 68 L. J. (Q. B.) 256. But the Court there laid no stress on those words, they did not refer to them.

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hold the defendants excused in the present case. The condition in this owner's risk note differs from that in all the cases cited, in that none of them included "misconveyance" among the causes of damage against which the company were to be relieved. The use of that word was probably intended to meet the very case which has arisen here, that of carriage off the stipulated route. It is difficult to see to what it does apply, if not to that.

[GREER J. The expression would seem rather to refer to some wrong conveyance during the agreed transit.]

It may be that the risk of the consignor will be very materially increased if the company are to be excused for delay when they send the goods over a totally different route from that contracted for; but he gets an ample consideration for that risk in the greatly reduced rate of carriage, and he ought not to be heard to complain if the alternative rate which he has voluntarily chosen turns out a bad bargain. In fact here the whole cause of the trouble was the plaintiff's neglect to label his packages properly, which was in direct contravention of Condition 10 of the contract.

Elkin in reply.

LUSH J. This appeal raises a question of considerable importance to persons who have their goods conveyed by a railway company under the familiar contract known as the owner's risk note. The plaintiff, who was going from Llandudno to Bolton with a theatrical company, entered into a contract with the defendants for the carriage of the theatrical properties of the company by the passenger train in which they themselves intended to travel. By the terms of the contract the plaintiff agreed that in consideration of the defendants carrying the members of the company and their personal luggage, costumes and scenery at the reduced rates therein specified he would relieve the defendants "from all liability for loss, damage, misconveyance, misdelivery, delay or detention of or to such goods during any portion of the transit . . . . except upon proof that such loss, etc., arose from the wilful misconduct of the Company's servants."

The luggage was to be conveyed in a separate truck. There is no doubt at all that the transit agreed upon was from Llandudno via Chester and Manchester to Bolton. Now the passengers were punctually conveyed to Bolton, and their luggage, which was duly put upon the truck reserved for their use, was conveyed by the passenger train as far as Manchester, but there it went wrong owing to the negligence of a servant of the defendants coupled with the fact that the Bolton label had somehow got detached from the truck. The defendants' inspector at Manchester who, if he had read a telegram correctly, would have known what he was dealing with, did not know what the truck was or to what place it was destined; accordingly he had the luggage taken out of the truck and despatched to a variety of places indicated upon some old labels which happened to be still on the packages. The consequence was that the things did not arrive at Bolton until too late, and the plaintiff and his company suffered considerable inconvenience and loss. The defendants set up as their answer to the plaintiff's claim the clause which I have read from the consignment note. They say that as the delay was not caused by wilful misconduct they are relieved from liability by the terms of that clause. The plaintiff relied on two cases: *Mallet* v. *Great Eastern Ry. Co.* (1) and *Gunyon* v. *South Eastern and Chatham Ry. Co.* (2) The county court held that those cases were distinguishable, and that he was bound by *Foster* v. *Great Western Ry. Co.* (3) to decide in favour of the defendants. But before dealing with those cases I propose to consider how the matter stands apart from authority. The contract was to carry the goods from Llandudno via Manchester to Bolton, and in a reserved truck. That was the agreed transit. And before the defendants can avail themselves of the protection given by the clause they must be in a position to prove that the delay complained of arose from some cause other than wilful misconduct during some portion of the transit; and I should have thought,

(1) [1899] 1 Q. B. 309. (2) [1915] 2 K. B. 370.
(3) [1904] 2 K. B. 306.

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apart from authority, that if the delay resulted from the goods travelling over some route which was not a portion of the agreed transit, some route which was never contemplated by the parties and to which the plaintiff never agreed, and from their being conveyed in a different way from what had been agreed to, the clause never came into operation at all.

It is very material to bear in mind what are the limits of the protection which the clause affords. A consignor may well consent to bear the risk of loss or delay while his goods are being carried a specified distance of say twenty miles, but it is quite another thing to ask him to bear that risk while his goods are being carried a distance of perhaps five hundred miles through some mistake on the part of the railway company's servants. The answer to the defendants' contention is that he never consented to that heavier burden. He consented to one thing, and the defendants seek to treat him as having consented to another. It is a totally different risk if the goods are to be conveyed along a route which was never suggested and to which he never agreed. The same observation applies to an unauthorized mode of transit. Apart therefore from authority I should be of opinion that the plaintiff was entitled to succeed. How then do the authorities stand? In *Mallet* v. *Great Eastern Ry. Co.* (1) the railway company who had entered into an owner's risk contract with the owner of the goods, by mistake despatched them by a different route to that agreed upon, and in consequence the goods were delayed. It was held that the condition in the contract did not relieve the company from responsibility, because the delay was not a delay in the performance of the contract. In *Foster* v. *Great Western Ry. Co.* (2) the goods were carried in performance of the contract over a part of the contract route as far as Exeter, but the defendants, who ought to have taken them out of the train at that point, forgot to do so and by mistake allowed them to be carried on to Taunton, which was off the contract route. The defendants were held protected by the condition. *Mallet's Case* (1) was

(1) [1899] 1 Q. B. 309. (2) [1904] 2 K. B. 306.

distinguished on the ground that there the company went wrong from the very start, having given wrong directions in the waybill, which was made out at Lowestoft, as to the route by which the goods were to be forwarded when they got to London, so that the mistake which was the cause of the delay was made not during the transit but before the transit began, whereas in *Foster's Case* (1) the mistake was made on the contract route. It is to be observed that the Court in *Foster's Case* evidently entertained considerable doubt as to the correctness of the decision in the earlier case. Later came *Gunyon* v. *South Eastern and Chatham Ry. Co.* (2) There fruit was delivered to the defendants for carriage by passenger train on the terms of a similar owner's risk note. The defendants carried it part of the way in a passenger train, and then caused it to finish its journey in a goods train whereby its delivery was delayed. The Court held that the company were not protected. The ground of their decision was that it was an essential part of the contract that the fruit should be carried by passenger train, and that consequently in transferring it to a goods train the defendants intentionally broke their contract in an essential matter.

In the present case the county court judge held that he was bound by *Foster's Case* (1) to decide in the defendants' favour. I cannot think that in so holding he was right. There seems to me to be a broad distinction between that case and the present; there the defendants did not intentionally send the goods by a route which was not the agreed route, whereas here the company's servant at Manchester intentionally, no doubt owing to a bona fide error, but still intentionally, caused these theatrical properties to be conveyed by a route to which the plaintiff never agreed. If the delay occurs at a time when the agreed transit is being intentionally departed from and when the goods are not being carried under the contract it seems to me impossible to say that there has been a delay during a portion of the transit,

(1) [1904] 2 K. B. 306. (2) [1915] 2 K. B. 370.

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so as to bring the case within the protection afforded by the condition. For these reasons I think that the appeal must be allowed.

GREER J. I agree. The question involved, having regard to the state of the authorities, is not free from difficulty. The essential facts of the case appear to be these: The plaintiff consigned his company's luggage to be carried along with them by the usual route from Llandudno to Bolton. It is not contested that the route that the greater part of the goods so consigned followed was not the route that was intended either by the railway company or by the plaintiff at the time the contract was made. It is admitted on behalf of the defendants that, apart from the special provisions contained in the owner's risk note, they would be liable for the delay that occurred, but it is said that they are protected by those provisions. Now what happened was that when the goods got to Manchester, by some unexplained negligence or accident the address upon the truck had been lost, and the instructions which the company's official at Manchester had got with regard to the arrival of this truck had been put in that official's pocket and forgotten, and having forgotten his instructions he intentionally caused the goods to be taken out of the truck and sent on an entirely different journey from that which was intended either by the company or the consignor when the contract was made. It seems to me in these circumstances that if one were not troubled by the authorities it would be only good sense to say that the stipulations which had been inserted in the contract for the defendants' protection on the assumption that the goods would travel via Manchester to Bolton would have no application to the journeys that these goods performed by being sent to different distant towns and then returned from thence to Bolton. The plaintiff, in my opinion, had never agreed that the defendants' responsibility should be limited by the terms of this contract upon a journey of the sort upon which they were actually sent after they arrived in Manchester. For myself, where goods have been intentionally sent upon

a journey not covered by the contract, I have a difficulty in seeing it can make any difference as regards the liability of the railway company whether they were started on a wrong journey immediately after they were delivered to the company or were diverted on to a wrong route after they had arrived at an intermediate station. It seems to me that in both cases the company have equally failed to perform the service in respect of which the limitation of liability was agreed to by the consignor. In these circumstances, apart from authority, I should have no difficulty in holding that the defendants are not protected against the consequences of a delay which was caused by the intentional despatch of the goods to towns to which they were never meant to go, and I think it makes no difference that that intentional despatch was due to a careless mistake made by an official of the company. They were in fact intentionally despatched on a journey which was not the agreed journey or anything like the agreed journey.

Then with regard to the authorities. Of those to which we were referred four—*Sleat* v. *Fagg* (1); *Garnett* v. *Willan* (2); *Mallet* v. *Great Eastern Ry. Co.* (3); and *Gunyon* v. *South Eastern and Chatham Ry. Co.* (4)—seem to support the plaintiff. The only case which creates a difficulty is *Foster* v. *Great Western Ry. Co.* (5) There goods were consigned to Jersey by a route which went through Exeter but not through Taunton. They got to Exeter, and then they ought to have been taken out of the van and put into another train. By mistake they were allowed to go on to Taunton. Whether it is a satisfactory distinction or not I am not sure, but there seems to be a distinction between that case and the present, that there was certainly in that case no intentional sending off of the goods by the railway company on a fresh journey after they had arrived at Exeter. What the railway company did was to forget to take them out of the van, and the whole of the subsequent delay arose in consequence of that mistake, and not in consequence of intentionally sending

(1) 5 B. & Al. 342.
(2) 5 B. & Al. 53.
(3) [1899] 1 Q. B. 309.
(4) [1915] 2 K. B. 370.
(5) [1904] 2 K. B. 306.

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them on a different journey from that on which they were consigned. I think that in the present case the judge ought to have given judgment for the plaintiff.

Appeal allowed.

Solicitors for the appellant: *A. De Freece & Co.*
Solicitor for the respondents: *M. C. Tait.*

J. F. C.

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May 10, 11, 27.

HAWKINS AND ANOTHER *v.* DUCHÉ.

Business Name—Failure to register—Disability to enforce business Contract—Power of High Court to grant Relief against—Assignee of Defaulter—Registration of Business Names Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 58), *s.* 8.

By s. 8, sub-s. 1, of the Registration of Business Names Act, 1916, where any person required by the Act to furnish particulars of registration makes default in so doing, his rights under any contract made by him in relation to the business in respect to which he was required to furnish such particulars "shall not be enforceable by action," provided that the "Court"—which is defined by sub-s. 2 to mean the "High Court or a judge thereof"—may grant relief against the disability imposed by the section on any grounds which it considers just and equitable:—

Held, (1.) that the High Court has power to grant such relief after the action is begun as well as before writ issued. (2.) The disability imposed by the section is limited to the defaulter and does not pass to his trustee in bankruptcy or other assignees.

TRIAL of action before McCardie J.

The action was brought by the trustees in bankruptcy of one Meyer Taper (or Töper) to recover damages against the defendants Duché and Sons for breach of contract on the sale to M. and B. Taper of two tons of cream of tartar substitute at the price of 165*l.* per ton in September, 1918. The stuff was bought for use as a constituent of baking powder, and it was alleged that when delivered it was found to be unfit for human consumption and did not answer the description under which it was sold. Subsequently to the delivery Meyer Taper was adjudicated bankrupt on January 4, 1919. In March, 1919, the plaintiffs commenced the action. Meyer Taper had a son named Bernard, aged 20, who worked

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with him in his business. One of the defences to the action was that the M. and B. Taper to whom the goods were sold was not a partnership consisting of Meyer and Bernard, but was Meyer trading alone under the style of M. and B. Taper; that Meyer had neglected to register his business name as required by s. 1 (1) of the Registration of Business Names Act, 1916; and that as he was in default the plaintiffs were precluded by s. 8, sub-s. 1, of that Act from enforcing Meyer Taper's rights under the contract by action. It was also contended that a further reason why registration of particulars under the Act was required was that Meyer Taper's real name was Töper, and was spelt wrong. It appeared that he was a Russian subject, the modified ö in his name being pronounced in Russia (2) like "a" in male, and when he arrived in England twenty-seven years ago he gave his name as it was pronounced in his own country—i.e., Taper. He accordingly became known as Taper, and his name was always written Taper. In July, 1919, an application was made to Roche J. for relief under s. 8 of the Act (3), but was refused. And a similar

(1) By s. 1 of the Registration of Business Names Act, 1916.

"Subject to the provisions of this Act:—

(*a*) Every firm . . . . carrying on business under a business name which does not consist of the true surnames of all partners who are individuals . . . . without any addition other than the true Christian names of individual partners or initials of such Christian names;

(*b*) Every individual . . . . carrying on business under a business name which does not consist of his true surname without any addition other than his true Christian names or the initials thereof . . . .

shall be registered in the manner directed by this Act."

(2) [The Russian alphabet has no means of representing the German modified vowels.—F. P.]

(3) By s. 8, sub-s. 1: "Where any firm or person by this Act required to furnish a statement of particulars . . . . shall have made default in so doing, then the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business in respect to the carrying on of which particulars were required to be furnished at any time while he is in default shall not be enforceable by action or other legal proceeding either in the business name or otherwise.

Provided always as follows:—

(*a*) The defaulter may apply to the Court for relief against the disability imposed by this section, and the Court, on being satisfied that the default was accidental, or due to inadvertence, or some other

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application was made to Salter J. in November of that year and also refused, but without prejudice to a further application. In December, 1919, a further application for relief was made to Bailhache J., who made an order "that relief be given against the misspelling of the name only without prejudice to the question of partnership." It was contended by the defendants that for the reasons hereafter dealt with Bailhache J. had no jurisdiction to make that order. At the hearing of the action McCardie J. found as a fact that Bernard Taper was in partnership with his father, and consequently (apart from the question of spelling) no default had been committed under the Act.

Comyns Carr and *J. G. Kelly* for the plaintiffs.

Montgomery K.C. and *Haydon* for the defendants. Bailhache J. had no jurisdiction to make the order which he did. The application for relief was made too late. It should have been made before the action was begun. The words in s. 8 "shall not be enforceable by action" are taken from s. 4 of the Sale of Goods Act, 1893, and must receive the same interpretation as they would receive in connection with a contract for the sale of goods. In *Lucas* v. *Dixon* (1), decided under s. 17 of the Statute of Frauds, where the words are slightly different, though they mean the same thing, it was held that a note or memorandum in writing in order to be available in an action on the contract must have been in existence when the action was commenced. The state of

sufficient cause, or that on other grounds it is just and equitable to grant relief, may grant such relief either generally, or as respects any particular contracts, on condition of the costs of the application being paid by the defaulter, unless the Court otherwise orders, and on such other conditions (if any) as the Court may impose."

. . . . .

Sub-s. 2: "In this section the expression 'Court' means the 'High Court' or a judge thereof;

Provided that, without prejudice to the power of the High Court or a judge thereof to grant such relief as aforesaid, if any proceeding to enforce any contract is commenced by a defaulter in a county court the county court may, as respects that contract, grant such relief as aforesaid."

(1) (1889) 22 Q. B. D. 357.

things upon the existence of which the bringing of a successful action depends must exist at the date of the writ. Here the registration of the business name corresponds to the memorandum under the Sale of Goods Act. The contract is sought to be enforced at the time when the action is brought.

Comyns Carr in reply. Bailhache J. had power to grant relief after action brought. The meaning of the words "shall not be enforceable by action" must depend upon the context in the particular statute in which they occur. *Lucas* v. *Dixon* (1) is not a decision of general application. The memorandum under the Statute of Frauds was only one of several conditions on which the action might be brought, the others being the acceptance of part of the goods or the giving of something in earnest to bind the bargain, and as those two latter conditions could not be satisfied after action brought the inference was that the condition of a memorandum must equally be satisfied before action. Here the proviso to sub-s. 2 of s. 8 makes it clear that the High Court was empowered to grant the relief after action, for it expressly gives that power to a county court: "Without prejudice to the power of the High Court or a judge thereof to grant such relief as aforesaid if any proceeding to enforce any contract is commenced by a defaulter in a county court the county court may . . . . grant such relief," and it cannot be supposed that the county court was intended to have wider powers than the High Court. Further the disability in the section does not apply to a trustee in bankruptcy. Such a trustee ought to be in at least as good a position as any other assignee, even though he does not take for value, and apparently the disability imposed by s. 8 has no application to assignees. In *Daniel* v. *Rogers* (2) the Court of Appeal expressed doubts as to whether s. 8 was intended to apply except as between the parties to the contract. Indeed the plaintiffs as trustees in bankruptcy of the defaulter had no power to make the application for relief, for the capacity of the defaulter to make

(1) (1889) 22 Q. B. D. 357. (2) [1918] 2 K. B. 228.

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such an application is not "property" which passes to the trustee under s. 38, sub-s. 1 (*b*), of the Bankruptcy Act, 1914.

MCCARDIE J. [after stating the facts as above set out proceeded as follows:] The serious contention was made by Mr. Montgomery on behalf of the defendants that the High Court has no power whatever to grant relief in and for the purpose of actually pending proceedings. He submits the relief must be granted (if at all) before and not after the issue of the writ. If this be so, it would follow that the order of Bailhache J. was without jurisdiction, and Mr. Montgomery submits that that order was a mere nullity. I need scarcely point out the serious nature of the submission. Ever since the Act of 1916 was passed relief has been many times granted in chambers after action begun, and for the purposes of the action itself. The practice is established and has never till now been challenged. Judge after judge of the greatest experience has granted full relief on appropriate terms. If Mr. Montgomery be right the whole existing practice will be overthrown. There is as yet no reported decision on the question. I will compress as far as possible my observations on this point and upon the able arguments of counsel. In the first place I point out that if the defendants be right it follows that the powers of the High Court are less than the powers of the county court in actually pending proceedings. The final proviso of s. 8 of the Act of 1916 gives the fullest power to the county court to grant relief—even on the day of trial—in respect of a contract before that Court. This power may be liberally exercised: see *Weller* v. *Denton*. (1) I cannot see why, as a matter of good sense, the High Court should not possess a power equal to that of the county court. If Parliament thought that a county court should relieve in pending proceedings, surely it would take the same view of High Court powers. In the next place I think the wording of the final proviso seems to assume that the High Court has already been given the powers yielded by the proviso to the county court.

(1) Ante, p. 103; [1921] 37 Times L. R. 599.

The words "without prejudice to the power of the High Court or a judge thereof to grant such relief" are, I think, significant. I hold that the true meaning of the final proviso is that where proceedings are pending in the county court, either the High Court or the county court can give relief in these pending proceedings. Either Court possesses, in such case, a right to grant relief. If this be so then it seems to follow that the final proviso casts a useful light on the earlier proviso. That earlier proviso says "The defaulter may apply to the Court for relief," and the wording of the proviso is wide. If Parliament had wished to limit the power of the High Court to cases where no proceedings had been begun nothing would have been easier than so to enact. The proviso states that relief may be given either "generally" or as "respects any particular contracts." These are very broad words, and I conceive that the word "generally" should receive a liberal interpretation. In my view the use of that word helps to show that the power of the High Court is not limited as the defendants suggest. After carefully considering the proviso and the arguments of counsel I venture to say: First, that the proviso upon the face of it gives the High Court the widest power of relief. Secondly, that there are no express words which limit those powers to relief before writ issued. Thirdly, that there is nothing in the scheme of the proviso or the scheme of the Act which so limits the jurisdiction of the High Court. Fourthly, that the final proviso of s. 8 assumes that the powers of the High Court are not so limited. Fifthly, that the fair administration of justice as between party and party require a construction of the Act which gives the High Court a power to grant relief as well after as before action. It is to be noted that the provisos give both the High Court and county court the widest powers to impose all proper conditions. It would, I feel, be deplorable if at the very close of a long and costly litigation a defendant should manage to elicit a trivial and inadvertent breach by the plaintiffs of the Act and thereby defeat the whole action which was otherwise well founded. The defendant would, I suppose, in such case then claim his costs. A further result might be that the

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plaintiff would be barred by the Statute of Limitations from commencing new proceedings after he had gotten relief. I venture respectfully to hope that such is not the law. The able argument of Mr. Montgomery mainly turned on the words "The rights of that defaulter under or arising out of any contract . . . . shall not be enforceable by action or other legal proceedings either in the business name or otherwise." The learned counsel referred to the wording of the Statute of Frauds and also to the wording of s. 4 of the Sale of Goods Act, 1893. The wording of the latter enactment is "a Contract for the sale of any goods of the value of 10*l.* or upwards *shall not be enforceable by action* unless . . . . etc." He pointed out that a memorandum for the purpose of s. 4 of the Sale of Goods Act, 1893, must be in existence before action brought, and he relied on *Lucas* v. *Dixon*. (1) In view of the fact that the Statute of Frauds and succeeding enactments are evidentiary provisions the decision in *Lucas* v. *Dixon* (1) is, as Fry L.J. there said, a singular one. It represents however the existing law. But in my opinion *Lucas* v. *Dixon* (1) casts no real light on the question before me. The Statute of Frauds and s. 4 of the Sale of Goods Act, 1893, give no power to any Court to grant relief against non-compliance with these provisions. Here the question is as to the extent of the wide relieving power given by the Act of 1916 itself. I point out also that s. 4 of the Sale of Goods Act, 1893, says that the "contract" shall not be enforceable, whereas s. 8 of the Act of 1916 says that the "rights" of the defaulter under the contract shall not be enforceable. The contract itself is in no way invalidated by the Act of 1916, and subheads (*b*) and (*c*) of the first proviso are well worthy of attention. I respectfully hold that the rulings of many of my brother judges in the past are correct, and that the High Court has ample power to give relief under the Act of 1916 not only before but also after action brought. The order of Bailhache J. therefore stands as a valid and effective exercise of the power of the Court.

This ruling renders it unnecessary in strictness to consider

(1) 22 Q. B. D. 357, 363.

the argument of Mr. Comyns Carr for the plaintiffs that the disability imposed by the Act of 1916 is imposed on the defaulter only, and that it does not extend to his assignees. The arguments however were full on the point, and I briefly deal with it, as it is of practical importance. The contention of Mr. Carr is largely founded on the observation of the Court of Appeal in *Daniel* v. *Rogers*. (1) The facts in that interpleader issue were somewhat different to the present facts. Several dicta however are relied on by Mr. Comyns Carr. Pickford L.J. said: "I entertain considerable doubt whether the Act of 1916 was ever intended to apply to the enforcement of a contract except as between the parties to it." Bankes L.J. expressed a similar view and pointed to the distinction between the Money Lenders Act, 1900, as compared with the Registration of Business Names Act, 1916. And Scrutton L.J.: "I desire to say, although it is not necessary finally to decide the point, that in my view the application of s. 8 is limited to proceedings between the parties to the contract." I respectfully think that the above weighty dicta represent the true interpretation of the Act of 1916. That Act, I think, was meant to punish a defaulter (unless he procured relief) rather than innocent third parties. Unless the dicta I have cited be good law the most serious consequences would follow. Innocent holders for value of negotiable instruments might under s. 8 be unable to enforce the rights of a defaulter. The position of innocent assignees of a defaulter's book debts would be equally imperilled. Even purchasers of goods from a trader who was in default under the Act of 1916 might (if the goods were warehoused or held by third persons) be met by a plea of the Act if action was begun against those persons for detention. The position would be still further aggravated if the assignor defaulter in the cases above put either absconded from the country or refused to make any application for relief. Take moreover the case of a defaulter who executes a deed of assignment for the benefit of his creditors and then leaves the country. Is the trustee of the deed of assignment stricken with inability to collect the assets or enforce the

(1) [1918] 2 K. B. 228, 231, 232, 233, 234.

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claims of the debtor? I cannot think so. I shall hold that the plaintiff trustees in bankruptcy in the present action are not affected by the disability (if any) of M. and B. Taper. I respectfully adopt and apply the views of Pickford, Bankes and Scrutton L.JJ. in *Daniel* v. *Rogers*. (1) I merely add that it is still more necessary to take the view I have ventured to express when it is remembered that an argument has arisen before me as to whether a trustee in bankruptcy can as such apply for relief under s. 8 in respect of a bankrupt who was a defaulter under the Act of 1916. The Bankruptcy Act, 1914, does not appear to expressly contemplate such circumstances.

In the present case I hold on the evidence before me that the application to Bailhache J. for relief was in fact made upon the joint application of Meyer Taper, Bernard Taper and the two plaintiff trustees. If it be necessary to do so I hold that a trustee in bankruptcy is entitled under the joint provisions of the Bankruptcy Act and the Registration of Business Names Act, 1916, to apply for relief under the latter Act: see, e.g., s. 38 (*b*) of the Bankruptcy Act, 1914, and the definition of "property" in s. 167 of that Act.

[The learned judge then proceeded to deal with the merits. He found that the stuff supplied by the defendants as cream of tartar substitute was not merchantable, and he gave judgment for the plaintiffs for 750*l*. damages.]

Judgment for the plaintiffs.

Solicitors for the plaintiffs: *Carter & Bell.*

Solicitors for the defendants: *Warwick Williams & Marchant.*

(1) [1918] 2 K. B. 228.

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1921
March 16.

BLUNDELL-LEIGH *v.* ATTENBOROUGH.

[1920. B. 558.]

Pledge—Validity—Delivery of Goods to Bailee for Purpose of creating future Pledge—Subsequent Pledge to Bailee—Intermediate Pledge by Bailee.

On November 1, 1919, the plaintiff handed her jewellery to one Miller to value it and let her know what offer he could make as to lending her money; he was to keep the jewellery as security if he made the advance. On the same day Miller pledged the jewellery with the defendant, a pawnbroker, who in good faith agreed to advance 1000*l.* on it, the transaction being completed on November 3. On November 5 it was arranged between the plaintiff and Miller that he should lend her 500*l.*, and that she should give him her promissory note for 600*l.* payable in six equal monthly instalments, and that he should retain possession of her jewellery as security for the payment of the promissory note. On December 8 Miller borrowed 300*l.* from one Berners, and deposited with him as security the plaintiff's promissory note and the defendant's counterfoil deposit note. Berners gave notice to the plaintiff of the deposit of the promissory note and required that payments under it should be made to him. On December 16 Miller died. The plaintiff paid Berners sums amounting to 400*l.* on account of the sum due on the promissory note, the payments being made with notice of the defendant's position and claim. The plaintiff made no tender to the defendant, and claimed the return of her jewellery :—

Held, that there was on November 1 a delivery of possession of the jewellery to Miller, which was a good delivery for the purpose of creating a pledge whenever that pledge should be created, the pledge being completed on November 5; and that the character of the delivery was not affected by the act of Miller in pledging the jewellery to the defendant on November 3. The plaintiff having made no tender to the defendant was not entitled to recover the jewellery.

Judgment of Salter J. [1921] 1 K. B. 382 reversed.

APPEAL from the judgment of Salter J. at the trial of the action without a jury. (1)

The action was brought to recover possession of certain jewellery which had been pawned by a third party with the defendant, who was a pawnbroker.

The facts, shortly stated, were as follows: In October, 1919, the plaintiff owed 400*l.* to a bookmaker named Barton, and he was pressing for payment. About a year before

(1) [1921] 1 K. B. 382.

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one Miller had lent the plaintiff a small sum, and she had deposited some jewellery with him as security. Miller, who had an interest in Barton's business, wrote to the plaintiff to ask if he could assist her. On November 1 at an interview between Miller and the plaintiff the latter handed the jewellery to Miller on the terms stated by the plaintiff in her evidence (which the Court accepted as correct): "I did not give Miller the jewellery to see if he could raise money on it. . . . . He was to examine the jewellery and see the value of it, and then he was to let me know what offer he could make as to lending me money. He was to keep the jewellery as security if he made the advance." Having obtained possession of the jewellery, Miller on the same day pawned it with the defendant for 1000*l.*, handing the jewellery to the defendant on that day, and the transaction was completed on November 3. The defendant acted in good faith, and no suggestion was made that he was negligent or put upon inquiry. On November 4 Miller sent to the plaintiff a receipt for "the twelve articles of jewellery you have deposited with me." On November 5 it was arranged between the plaintiff and Miller that he should lend her 500*l.*, that she should give him a promissory note for 600*l.*, and that he should retain possession of the jewellery as collateral security for the payment of the promissory note. She received the 500*l.* and signed a promissory note dated November 5, 1919, promising to pay Miller or order 600*l.* in six equal monthly instalments, the first to be paid on January 1, 1920, and the whole amount unpaid to become payable on default in payment of any instalment. She also signed a document of the same date addressed to Miller which stated that: "I hereby deposit with you as collateral security the following articles. . . . . Should I make default in payment of the said promissory note, you are hereby at liberty to dispose of the said articles. . . . ."

On or before December 8 Miller borrowed 300*l.* from one Berners, a bookmaker, and deposited with him as security the plaintiff's promissory note and the defendant's counterfoil deposit note, stating to Berners that the jewellery

mentioned in the latter document was the property of his wife. Berners gave notice to the plaintiff of the deposit of the promissory note, and required that all payments under it should be made to him. On December 16 Miller committed suicide. The plaintiff paid Berners sums amounting to 400*l.* on account of the sum due on the promissory note; she made these payments with notice of the defendant's position and claim. She made no tender to the defendant, and claimed the return of her jewellery. The statement of defence is set out in the report of the case below. (1)

Salter J. held that the handing of the jewellery by the plaintiff to Miller was a mere gratuitous bailment, and that Miller thereby acquired no right of property in or disposition over the jewellery; that the pawning of the jewellery by Miller with the defendant was in fraud of the plaintiff and of the defendant, and that it determined the bailment; that as Miller acquired no right to hold the jewellery against the plaintiff by virtue of the original bailment he could not give any right to the defendant; that there never had been any valid pledge of the jewellery by the plaintiff to Miller, as the jewellery was not at the time of the contract of pledge, and had never since been, in the actual or constructive possession of either, and that therefore Miller never acquired any right to hold the jewellery against the plaintiff which he could transmit to the defendant or which could enure to the benefit of the defendant. He gave judgment for the plaintiff.

The defendant appealed.

Schwabe K.C. and *C. L. Attenborough* for the defendant. The jewellery was delivered to Miller with a view to his taking it in pledge if he made an advance to the plaintiff on it. The advance was made on November 5, and the relation between the plaintiff and Miller became that of pledgor and pledgee from the first. "The pledge may be delivered as security either for a future or for a past debt": Fisher on Mortgages, 6th ed., s. 196. The debt here was a future

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debt. "If the pledgee has the thing already in possession, as by a deposit or a loan, there the very contract transfers to him, by operation of law, a virtual possession thereof as a pledge, the moment the contract is completed": Story on Bailments, 9th ed., s. 297. *Whitehorn* v. *Davison* (1) is in point. The pledge to Miller was therefore valid, and Miller's interest or special property in the things pledged could be assigned. The plaintiff therefore is not entitled to the jewellery except upon tendering at the least the amount remaining unpaid of the sum due on the advance made by Miller. No tender having been made by the plaintiff to the defendant, who took the jewellery in pledge from Miller in good faith, the plaintiff is not entitled to recover. The delivery of the jewellery to Miller for the purpose of creating a pledge cannot be affected by Miller's subsequent fraud.

J. D. Cassels (*Sir Ellis Hume-Williams K.C.* with him) for the plaintiff. In *Whitehorn* v. *Davison* (1) there was a sale, not a pledge. A person can sell a thing of which he has not got possession; he cannot pledge it. Miller was a mere gratuitous bailee of the jewellery from the plaintiff on November 1 for the purpose of examination, and his improper dealing with the jewellery by pledging it with the defendant on November 3 determined the bailment. There could be no pledge of the jewellery on November 5, because Miller had already parted with the possession by pledging it with the defendant on November 3. To constitute a valid pledge there must be a delivery of possession as part of the contract of pledge: see Story on Bailments, 9th ed., s. 297. The contract of November 5 was therefore no contract of pledge at all, and the defendant has no right to hold the jewellery. The judgment is therefore right.

No reply was called for.

BANKES L.J. I do not take the same view of this case as the learned judge. I do not, I think, differ from his view of the law; the point of difference lies in the inference to

(1) [1911] 1 K. B. 463.

be drawn from the facts. The facts are shortly these: The plaintiff was the owner of certain jewellery. She was in need of money, and she got into communication with Miller with a view to his procuring money for her. On November 1, 1919, they had an interview, and the plaintiff describes what happened in these terms: "I did not give Miller the jewellery to see if he could raise money on it. I did not say he was to have the jewellery. He was to examine the jewellery and see the value of it, and then he was to let me know what offer he could make as to lending me money. He was to keep the jewellery as security if he made the advance." I agree that the effect of what passed between the plaintiff and Miller on that day was to constitute him a gratuitous bailee of this jewellery for the purpose of ascertaining its value, and deciding whether he could make an advance, and if so, to what amount. But there was on that day a bailment and a delivery, and the conclusion of fact that I draw from what occurred is that the delivery, although it accompanied the bailment and was therefore a delivery for the purpose of the bailment, was also a delivery which as between these parties was to constitute a good delivery for the purpose of creating a pledge if Miller found that he could and did advance a sum which the plaintiff could accept. On the same day Miller went to the defendant and pledged the jewellery with him for 1000*l.*, obtaining a first advance of 500*l.* and the balance on November 3. On November 5 Miller saw the plaintiff and finally arranged with her the terms of the pledge of her goods to him.

The learned judge says this (1): "Pledge is a conveyance pursuant to a contract, and it is essential to a valid pledge that delivery of the chattel shall be made by the pledgor to the pledgee in pursuance of the contract to pledge. Delivery may of course be made by and to agents, and it may be actual or constructive. If, at the time of the contract to pledge, the pledgee is already in possession in another capacity, the contract to pledge is itself constructive

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delivery. Even if the pledgee is not in possession at the time of the contract, but acquires possession from a third party subsequently, it may be that such acquisition of possession would, by virtue of the contract to pledge, amount to constructive delivery by the pledgor." I do not think any one will quarrel with the learned judge's statement of the law. But then he goes on in reference to the facts of this particular case: "But where, as in this case, the goods were not at the time of the contract to pledge, and have never since been, in the actual or constructive possession of the pledgor or pledgee, or of any agent of either, I think that no valid pledge was at any time possible." That is where I disagree with the learned judge, and I do so because upon the facts I draw the inference that there had been, by agreement on November 1, a delivery which was a good delivery for the purpose of creating a pledge, whenever that pledge was created. The pledge was in fact completed on November 5. The argument for the plaintiff is that the effect of the delivery on November 1 was at an end from the moment when Miller parted with the goods. I cannot accept that as the true inference from the facts. It is clear to my mind that the plaintiff intended, when she handed over the jewellery to Miller, to create a valid pledge as between him and her from the moment when he handed her the money by way of loan which she was prepared to accept. In these circumstances the fact that Miller did something between November 1 and 5 that he had no right to do does not seem to me to affect the character of the delivery. I think that the decision in *Whitehorn* v. *Davison* (1) showed, to adopt the language used in that case, that the transaction of November 5 "went to feed the defendant's title."

For these reasons I think that, there having been no tender, the defendant is entitled to judgment.

WARRINGTON L.J. I am of the same opinion. The jewellery was delivered to Miller, who had possession of it

(1) [1911] 1 K. B. 463, 475.

at the time when he delivered it to the defendant. The question is, what were the terms upon which he had possession of the jewellery? I think those terms are best expressed in the evidence of the plaintiff in cross-examination. After stating that she had deposited the jewellery with Miller, she went on to say: "He was to examine the jewellery and see the value of it, and then he was to let me know what offer he could make as to lending me money." Then come these words, which are of the utmost importance: "He was to keep the jewellery as security if he made the advance." It seems to me quite plain that the arrangement made between them was this: that if he made the advance the jewellery was to stand as security for the advance, and the possession given originally before the advance was made was the possession which was to be kept by him for the purpose of creating the security by way of pledge. It seems to me that in this case no further delivery of possession was required; that although it was open to the plaintiff to refuse an advance, in which case Miller would remain a mere gratuitous bailee, as soon as the advance was made and was accepted by the plaintiff, as it was in fact made and accepted, then there was a complete contract, and the legal position of pledgor and pledgee was constituted, not by a new delivery of possession at the time of the advance, but by the original delivery of possession which had been made for the purpose of creating the security which was ultimately agreed to. It is there that I differ from the learned judge. I do not think that in these circumstances it was necessary that at the time of the advance the goods should be actually in the possession of Miller. I agree therefore that judgment should be entered for the defendant.

ATKIN L.J. I agree. I think it is sufficient for the purposes of this appeal to say that in one small particular I draw a different inference of fact from that drawn by the learned judge. After stating the arrangement that the plaintiff should hand Miller the jewellery so that he might

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examine and value it to enable him to decide whether or not he would make an offer to assist her, the learned judge says (1): "She handed to him the jewellery in pursuance of this arrangement, and for this purpose only." With great respect I do not think that is a true inference from the facts. I think it was handed to him for the purpose indicated—namely, that he should value it to enable him to decide whether or not he would make an offer to assist her—and for the further purpose that if he did make an offer of the kind that had been discussed between them—namely, of 500*l.*—then he was to hold the jewellery as security for that advance. Therefore that was a delivery which, it seems to me, as soon as he made the advance assented to by the plaintiff, would be a good delivery so as to constitute a valid pledge. I think that in these circumstances the title that was given to Miller would enure to the benefit of the defendant. Therefore for the reasons already given by my brothers I agree that this appeal should be allowed and judgment entered for the defendant.

Appeal allowed.

Solicitor for plaintiff: *A. Ross Dagg.*

Solicitors for defendant: *Stanley Attenborough & Co.*

(1) [1921] 1 K. B. 383.

W. F. B.

SIMPSON AND ANOTHER *v.* CROWLE AND OTHERS.

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April 11, 12, 20.

County Court—Jurisdiction—Action for Injunction—Damages not claimed nor recoverable in Law—Jurisdiction by Consent—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 56, 64, 114.

A respondent to an appeal from a county court is not precluded from raising on the hearing of the appeal points not raised at the trial in the county court.

By s. 114 of the County Courts Act, 1888, "whenever an action or matter is commenced over which the Court has no jurisdiction, the judge shall, unless the parties consent to the Court having jurisdiction, order it to be struck out, and shall have power to award costs in the same manner, to the same extent, and recoverable in the same manner, as if the Court had jurisdiction therein, and the plaintiff had not appeared, or had appeared and failed to prove his demand or complaint":—

Held, that the section does not confer a general power to enlarge the jurisdiction of the county court by consent.

An action was brought in the county court by two members of a voluntary association against the members of the committee of the association for an injunction to restrain the defendants from interfering with the plaintiffs' enjoyment of the association. No damages were claimed in the action. The county court judge dismissed the action. No objection was raised at the trial to his jurisdiction. The plaintiffs appealed, and the objection was then taken by the defendants that the county court judge had no jurisdiction to try the case:—

Held, that as the claim was solely for an injunction and not for an injunction as ancillary to a cause of action within s. 56 of the County Courts Act, 1888, the county court judge had no jurisdiction, and that the mere fact that the parties proceeded with the trial without the point as to jurisdiction having been raised did not confer jurisdiction upon the county court judge.

APPEAL from the judge of the Whitehaven County Court.

The plaintiffs, Henry Simpson and Joseph Latton, were members of a voluntary association called the Hound Trailing Association, and the eight defendants were the members of the committee of the association for the Whitehaven area.

A hound trail was held at Beckermet on October 9, 1920, at which the plaintiff Simpson acted in the capacity of judge and secretary. The plaintiff Latton was the owner of a hound called "Comrade" which came in first. There were five prizes, and the hound "Royal" that came in second belonged either to the defendant Jefferson, the president of the association, or to Mr. Jefferson's son, the hound "Fetler"

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that came in sixth belonged to the defendant, Colonel J. A. Jackson.

On the next day the following notice was sent by the secretary of the association to the plaintiff Simpson: "You are requested to attend a committee meeting of the association on Wednesday 14th inst. at the Royal Oak, Beckermet, at 3 P.M. Business—Beckermet Trail."

The following notice was sent to the plaintiff Latton: "Referring to our conversation yesterday, a meeting of the committee of the association will be held on Wednesday 14th inst. at the Royal Oak, Beckermet, at 5 P.M. You are requested to attend to explain the running of your hound 'Comrade,' also the betting which took place in regard to it at Beckermet Trail yesterday."

The committee meeting was held on October 13, the date given in the notice being a mistake. The members of the committee who were present on October 13 were the eight defendants, including Mr. R. Jefferson, who presided, and Colonel J. A. Jackson. After hearing the explanations of the two plaintiffs the committee resolved that in consequence of the unsatisfactory explanation given, the membership of the plaintiff Simpson should be cancelled, and that the plaintiff Latton should be suspended. The committee also decided that the hound "Comrade" should be disqualified as the winner of the trail and that the hound "Royal" should be declared as winner of the first prize, and the hound "Fetler" as the winner of the fifth prize.

The rules of the association provided as follows: Rule 14: "Any hound proved to the committee to have been exercised over the starting or finishing portion of the trail after the meeting has been duly advertised for the purpose of the hound obtaining an undue advantage, or any member who shall have exercised a hound upon any land within one hour before sunset, and before sunrise, such owner and hound shall be liable to be disqualified by the committee from again competing at any meeting under the control of the Association, or to such other penalty as may be imposed by the committee." Rule 19: "No one interested in the competition shall act as

starter or judge, or upon the adjudication of any dispute concerning the hound he is interested in. . . . ." Rule 20: "Any infringement of these rules on the part of a member or by a meeting may, by the committee, be deemed a disqualification of membership. The committee may, for any cause which they may consider sufficient, annul the membership of any member and the registration of any hound, and thereupon the membership and registration shall be cancelled. . . . ."

The two plaintiffs then commenced an action in the county court, claiming an injunction restraining the defendants from interfering with the plaintiffs' enjoyment of the Hound Trailing Association. The plaintiffs claimed that the proceedings of the committee were contrary to natural justice; that they had no notice, or not sufficient notice of the charge or charges against them, and no fair opportunity of meeting them, and that two of the defendants—namely, Jefferson and Jackson—adjudicated on the matter, although they were interested in the competition and in the hounds concerning which the dispute arose, and were consequently disqualified under rule 19.

No claim for damages was made in the particulars of claim, but on November 22, 1920, the plaintiffs' solicitors wrote to the defendants' solicitor stating that the plaintiffs had suffered damage by reason of the matters complained of and they accordingly claimed 50*l.* damages. No amendment of the claim was however asked for at the trial and no evidence of damage was given.

The defendants by their defence said that the membership of Simpson was cancelled because he did not comply with the rules of the association by specifying the amount of the prize money to be given for the trail and how it was to be divided, and also because the trail was run over land without permission having been obtained.

The membership of Latton was suspended because the committee of the association were not satisfied with his explanation why his hound "Comrade" should have been backed at even money, considering the number of trail-winning hounds which were also competing and which were all on offer

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by the bookmakers at long odds. The members of the committee were of opinion that "Comrade" had had some undue advantage which was known to the public who were backing it, such as having been run over the trail (and it was currently reported before the trail that it had been run over the trail); otherwise it could not have been backed at such a ridiculous price or have won so easily.

The county court judge held that the committee of the association did not act contrary to natural justice and that they did not act in bad faith in arriving at their decision, and he accordingly dismissed the action.

The plaintiffs appealed.

Cyril Atkinson K.C. and *Cremlyn* for plaintiffs.

Schiller K.C. and *Herbert Smith* for defendants. There is a preliminary objection to the hearing of this appeal. The county court judge had no jurisdiction to deal with the matter at all, as the claim was for an injunction only, and a county court judge has no jurisdiction to grant an injunction or a declaration in a personal action where damages are not claimed and are not recoverable in law: *Rex* v. *Cheshire County Court Judge. Ex parte Malone.* (1) Even if there had been a claim for damages still the action would not lie in the county court, as it would not be a personal action within s. 56 of the County Courts Act, 1888. No action can be brought by the plaintiffs against the association or against the committee, because that would be the same as the plaintiffs suing themselves. This defect as to the jurisdiction of the Court appears on the face of the proceedings and therefore can be taken in this Court even though it was not taken in the Court below, and even though the party consented to or acquiesced in the exercise of jurisdiction by the inferior Court: *Farquharson* v. *Morgan* (2); *Rawlings, Ld.* v. *Hodgson.* (3)

[BRAY J. A county court judge is bound under s. 114 of the County Courts Act, 1888, whenever an action or matter is commenced over which the Court has no jurisdiction,

(1) [1921] 2 K. B. 694. (2) [1894] 1 Q. B. 552, 556.
(3) (1918) 87 L. J. (K. B.) 761, 766.

to order it to be struck out, unless the parties consent to the Court having jurisdiction. Ought it not to be assumed that the parties did consent in the present case to the Court having jurisdiction ?]

Consent was given by the parties in *Farquharson* v. *Morgan* (1), and it was nevertheless held by the Court of Appeal that the Court had no jurisdiction, as the defect appeared on the face of the proceedings and could not be cured by consent. Sect. 114 was not brought to the attention of the Court in that case.

[LUSH J. Sect. 64 of the County Courts Act, 1888, gives a county court judge jurisdiction to try an action if the parties agree in writing to his trying it.]

That only applies to actions assigned to the Queen's Bench Division of the High Court; it does not confer jurisdiction upon a county court judge on matters which are not assigned to the Queen's Bench Division. It is true that s. 114 is framed in wider terms, but the main object of that section is to give a county court judge power to deal with costs in cases in which he has no jurisdiction except by the consent of the parties. It probably refers to the case of an action commenced in the wrong county court. If the Legislature had intended to enlarge the jurisdiction of a county court judge one would expect to find it in s. 64 rather than by implication in s. 114. Further, the action will not lie at all unless the plaintiffs can prove that they have a proprietary interest in the voluntary association; the payment of a subscription of 5*s.* is not sufficient to support a plea of proprietary interest: see *Forbes* v. *Eden* (2); *Rigby* v. *Connol* (3); *Baird* v. *Wells* (4); *Chamberlain's Wharf, Ld.* v. *Smith* (5); *Osborne* v. *Amalgamated Society of Railway Servants.* (6) [He was stopped.]

Cyril Atkinson K.C. for the plaintiffs. The county court judge at all events obtained jurisdiction to deal with this claim by the consent of the parties. A county court judge has power to deal with breaches of contract and to grant an

(1) [1894] 1 Q. B. 552.
(2) (1867) L. R. 1 H. L. Sc. 568.
(3) (1880) 14 Ch. D. 482, 487.
(4) (1890) 44 Ch. D. 661.
(5) [1900] 2 Ch. 605.
(6) [1911] 1 Ch. 540, 562.

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injunction. It was held in *Kelly* v. *National Society of Operative Printers' Assistants* (1) that a member of a trade union can maintain an action in the county court against the trade union for a declaration and injunction, although he cannot recover damages for breach of contract against the society of which he is a member. In the present case there was a contract between the plaintiffs and the members of the association, which contract has been broken by the defendants. It is true that the plaintiffs could not bring an action for damages against the members of the association, but they had a right of action against the individual members of the committee. There have been several cases in which an action has been successfully brought against the member of the committee of a club for an injunction: see *Labouchere* v. *Earl of Wharncliffe* (2) and *D'Arcy* v. *Adamson*. (3) This case is the same as *Kelly's Case*. (1) That case can be reconciled with *Malone's Case* (4), because in *Kelly's Case* (1) no objection was taken to the jurisdiction of the county court judge, and therefore s. 114 of the County Courts Act, 1888, applied and the county court judge had jurisdiction by consent. Whereas in *Malone's Case* (4) an objection to the jurisdiction of the county court judge was taken. Watson B. said in the course of the argument in *Lawford* v. *Partridge* (5) that "it is only when the want of jurisdiction appears and is relied upon that the [County] Court loses its jurisdiction."

[BRAY J. Can a party give a county court jurisdiction by making a claim for damages which could not be sustained ?]

An action in which an injunction only is claimed is within the jurisdiction of a county court, provided the case is one in which, if there had been a claim for damages, the claim must have been within the jurisdiction of a county court: see *Stiles* v. *Ecclestone*. (6) In that case the claim was for an injunction only, no damages being claimed, but it was a case in which the damages could not have exceeded 40*l*. and therefore was within the limit of the county court jurisdiction.

(1) (1915) 84 L. J. (K. B.) 2236.
(2) (1879) 13 Ch. D. 346.
(3) (1913) 29 Times L. R. 367.
(4) [1921] W. N. 127; now reported 2 K. B. 694.
(5) (1857) 26 L. J. (Ex.) 147, 148.
(6) [1903] 1 K. B. 544.

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Under s. 89 of the Judicature Act, 1873, every inferior Court having jurisdiction in equity, or at law and in equity, shall, as regards all causes of action within its jurisdiction, have power to grant such relief, redress or remedy in as full and ample a manner as might and ought to be done in the like case by the High Court. A claim for injunction where there is no claim for damages or a claim for damages under 100*l.* is a personal action within s. 56 of the County Courts Act, 1888, and therefore within the jurisdiction of the county court. If the point had been raised in the county court the claim might have been amended by claiming 50*l.* damages. Sect. 10 of the County Courts Act, 1919, deals with the powers of a county court judge in the case of an action commenced in the wrong county court, and therefore s. 114 of the County Courts Act, 1888, cannot be limited as referring to that matter only. That section must refer to cases outside the county court jurisdiction and is intended to cover a case like the present case. As soon as it appears that the Court has no jurisdiction the point must be taken and the case must be struck out unless the parties consent to the Court having jurisdiction. *Farquharson* v. *Morgan* (1) was decided under the Agricultural Holdings (England) Act, 1883, which does not contain a section similar to s. 114 of the County Courts Act, 1888, giving the Court jurisdiction by consent of the parties in cases where the Court has no jurisdiction; therefore that case has no application here.

Schiller K.C. in reply. The decision in *Kelly's Case* (2) was much criticised by the Court of Appeal in *Malone's Case.* (3) The Court of Appeal in that case overruled the decision of the Divisional Court (4), which largely rested upon the decision in *Kelly's Case.* (2) The Court of Appeal in *Malone's Case* (3) also in effect overruled *Stiles* v. *Ecclestone* (5) if that case decided that the fact that no debt or damage was claimed in an action for an injunction was immaterial.

Cur. adv. vult.

(1) [1894] 1 Q. B. 552.
(2) 84 L. J. (K. B.) 2236.
(3) [1921] W. N. 127; now reported 2 K. B. 694.
(4) [1921] 1 K. B. 301.
(5) [1903] 1 K. B. 544.

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April 20. BRAY J. read the following judgment: This was an appeal from the judgment of the learned county court judge at Whitehaven, dismissing with costs an action brought by the appellants in which they claimed an injunction restraining the defendants from interfering with the enjoyment by the plaintiffs of the use and benefits of the Hound Trailing Association. The plaintiffs and the defendants were members of this voluntary incorporated association, and the defendants, who were the members of a committee and acting under rule 20, had expelled the plaintiff Simpson and suspended the plaintiff Latton from their membership of the association. The plaintiffs claimed that the proceedings of the committee were contrary to natural justice, that they had no notice, or no sufficient notice of the charge or charges against them, and no fair opportunity of meeting them, and that two of the defendants, Jefferson and Jackson, adjudicated on the matter, although they were interested in the competition and in the hounds concerning which the dispute arose and were disqualified by rule 19. The county court judge decided against the plaintiffs, and they appealed on the ground that the judgment of the county court judge was bad in law, and that there was no evidence to support the learned judge's findings of fact.

The defendants, the respondents in the hearing before us, in addition to disputing the grounds of appeal, raised the further point that the judge had no jurisdiction to try the case. These contentions of the parties raised interesting and difficult points, and we therefore took time to consider our judgment. I will deal with the further point first. If the judge had no jurisdiction to try the case on its merits, neither have we. The claim, in the particulars of claim, was for an injunction only, but before the hearing the plaintiffs' solicitors wrote on November 22 intimating that they should claim 50*l.* damages. They did not, however, at the trial ask for any amendment, and no evidence was given as to any damage. The point as to the jurisdiction of the learned judge to try the case was never raised in any way at the trial, and the learned judge was never asked to give, nor did he give, any decision

on this question. The trial proceeded throughout on the footing that the learned judge had jurisdiction.

The defendants' contentions before us were that the county court has no jurisdiction in an action (not on the equity side) for an injunction alone, and that it can only be given where there is a cause of action within s. 56 of the Act of 1888; that in this case the plaintiffs had no cause of action at all which fell within s. 56, first, because no action would lie for damages against the members of the committee, and, secondly, because if such an action did lie there was nothing to show that the damages would not exceed 100*l*. Reliance was placed by the defendants on the judgment of the Court in *Malone's Case*. (1) This case has not yet been fully reported, but I have had the opportunity of reading the judgments of the learned judges of the Court of Appeal. I have come to the clear conclusion that the Court decided that when the only claim in the plaint is for an injunction the judge in the county court has no jurisdiction, at all events unless it is shown that there can be a cause of action for damages, and for damages not exceeding 100*l*. The right to an injunction is only a remedy ancillary to a cause of action within s. 56. In my opinion, therefore, the learned judge had no jurisdiction to try the case. The appellants however contended that there was conduct on the part of the defendants which was equivalent to a consent such as would give jurisdiction, or that their conduct created an estoppel which prevented them raising this point, that there was a want of jurisdiction. Now s. 64 of the County Courts Act of 1888 undoubtedly gives jurisdiction where the parties sign a memorandum agreeing that the judge shall have jurisdiction, but this is expressly confined to cases in the Queen's Bench Division. Here there was no such memorandum. But s. 114 has also to be considered. It was much relied upon by the appellants. It is in these words: "Whenever an action or matter is commenced over which the court has no jurisdiction, the judge shall, unless the parties consent to the court having jurisdiction, order it to be struck out, and shall have power to award costs in the same manner,

(1) Now reported [1921] 2 K. B. 694.

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to the same extent, and recoverable in the same manner, as if the court had jurisdiction therein, and the plaintiff had not appeared, or had appeared and failed to prove his demand or complaint." This section does not in terms give jurisdiction, but it appears to absolve the judge from the obligation to strike the case out. I can hardly think that this consent, which need not even be in writing, gives the judge jurisdiction to try any cause of action, whatever it might be, and whether in the Queen's Bench Division, or any other division. Perhaps it is not necessary to decide this question, because I think in any event it applies only when an actual assent is given after the question of jurisdiction has been raised. Here it was not raised, nor was there any actual assent. I do not think that the mere fact that the parties proceeded with the trial without the point being raised at all comes within this section.

Lastly, I have to deal with the question of estoppel by conduct. Can estoppel by conduct give jurisdiction? We were referred to *Farquharson* v. *Morgan*. (1) I think that that case is distinguishable in its facts. No Court could have given the relief claimed, but the principle is laid down very broadly by the Court. Lord Halsbury says (2): "In this case, with every disposition to decline to interfere with the proceedings in the county court on the ground that, if it is possible for a person to render himself incapable of applying for a prohibition in such a case as this, the appellant has done so, I feel nevertheless constrained to decide that the writ must issue to prohibit further proceedings on the order of the county court so far as it is applicable to that portion of the award which is in respect of matters outside the Agricultural Holdings Act. It has been long settled that, where an objection to the jurisdiction of an inferior Court appears on the face of the proceedings, it is immaterial by what means and by whom the Court is informed of such objection. The Court must protect the prerogative of the Crown and the due course of the administration of justice by prohibiting the inferior Court from proceeding in matters as to which it is

(1) [1894] 1 Q. B. 552. (2) Ibid. 556.

apparent that it has no jurisdiction. The objection to the jurisdiction does not in such a case depend on some matter of fact as to which the inferior Court may have been deceived or misled, or which it may have unconsciously neglected to observe, and the judge of such Court, therefore, must or ought to have known that he was acting beyond his jurisdiction. I find no authority justifying the withholding of a writ of prohibition in such a case." In this case the want of jurisdiction appeared on the face of the proceedings. The plaint as it stood claimed relief which the county court could not give. I have come to the conclusion that here there was no estoppel. It follows, therefore, that in my opinion the county court judge had no jurisdiction to try this case.

Then it was said that a point cannot be raised on an appeal which was not raised in the county court. But the respondents are not prohibited, like the appellants, from raising points not raised at the trial. Our attention has been called to *Taylor* v. *National Amalgamated Approved Society* (1), but there it was the appellants who were trying to raise the want of jurisdiction, and it was quite different in its facts. This makes it unnecessary and perhaps as impossible for this Court as it was for the county court judge to go into the merits of the appeal, and as these questions may come before another Court I think we ought to refrain from expressing any opinion on them. It was open, therefore, to the respondents to raise this point before us, and we must give them the benefit of it. If raised at the trial, and the judge had decided that he had no jurisdiction, and dismissed the action on this ground, I think the judgment should have made it plain that the ground of the judgment was want of jurisdiction. I think it should have run : the judge, being of opinion that he has no jurisdiction to try the action, doth dismiss it. I think that the judgment should be altered so as to run in that way. This will make it plain that the plaintiffs, if they care to do so, can bring the action in the High Court, and that the judgment cannot be pleaded as an estoppel.

We have now to deal with the costs of the trial, and of this

(1) [1914] 2 K. B. 352.

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appeal. Following the precedent in *Farquharson* v. *Morgan* (1), where Lord Halsbury said: "Considering the course of the litigation, I think the appellant ought not to have any costs of the proceedings except in this Court where he has succeeded," we think there should be no costs in the Court below. Now as to the costs of the appeal. The circumstances here, of course, are different. In that case the appellant had to go to the Court to ask for a prohibition. In this case the case comes before us at the instance of the plaintiffs, and not the defendants. The appellants have obtained a distinct advantage by their appeal. They have got rid of a decision on the merits. If they bring an action in the High Court the judgment, as I have said, can no longer be pleaded as an estoppel. They have not, of course, gained all they wanted, but they have gained something. I think there should be no costs of the appeal.

LUSH J. read the following judgment: It is in my opinion clear from the judgment of the Court of Appeal in *Malone's Case* (2), that the learned county court judge had no jurisdiction in fact to try this action. The plaintiffs not only did not claim damages, but they could not have claimed them successfully. They sued the committee, it is true, and not the association of which they were members, but the committee were acting as arbitrators and having acted bona fide were not liable. As the Court of Appeal have held, an injunction can only be granted or such a claim entertained in the county court where the relief is ancillary to the relief to which a plaintiff establishes his right in accordance with s. 56 of the County Courts Act, 1888. In other words a plaintiff cannot make a claim in a county court for an injunction unless he proves that he is entitled to payment of a debt or damages or a demand in the nature of a debt and that the amount of the debt or damages is within the county court limit.

But it was contended that the defendants (the respondents in the appeal) could not take this point, and it was so contended on two grounds. First, on the ground that the point was not

(1) [1894] 1 K. B. 557. (2) [1921] 2 K. B. 694.

taken in the Court below, and secondly, on the ground that the defendants consented to the exercise of jurisdiction by the learned judge. I do not think that the answer which counsel for the defendants made to the first of these two grounds—namely, that it is open to a respondent to support a judgment on any ground—is a good answer. That contention involves, I think, a misconception. If a successful defendant (respondent on the appeal) raises the contention that the injunction, or whatever the relief may have been, was rightly refused by the county court judge, because he had no jurisdiction to grant it, he is not supporting the judgment; he is asserting that the judge was wrong in giving any judgment at all. But there are other answers to the contention. In the first place the point could not then have been successfully taken. The Divisional Court had decided in *Malone's Case* (1) that there was jurisdiction, and the case had not then gone before the Court of Appeal. The county court judge was bound by that decision, and to take such a point and ask the judge to give effect to it would have been idle. But apart from that we should be obliged, when the absence of jurisdiction was pointed out to us, to hold that there was none. We could not affirm a judgment and ignore the fact that the action ought not to have been heard. The question of jurisdiction is one for the Court, and it would be our plain duty to hold that there had been an absence of jurisdiction, if we were satisfied that it was so.

There is a case to which I wish to call attention, which was not cited to us in argument, of *Taylor* v. *National Amalgamated Approved Society* (2) which may seem to show that if no objection is taken to the jurisdiction in the county court this Court cannot take notice of the fact that there was no jurisdiction when that fact is brought to our notice. In my opinion that case has no real bearing on the question before us. The point there was this: The National Insurance Act, 1911, provides that disputes shall be decided according to the rules of the society and the society's rules provided for arbitration. The dispute, therefore, ought to have gone before an arbitrator.

(1) [1921] 1 K. B. 301. (2) [1914] 2 K. B. 352.

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The appellants (the defendants), who had never raised that point in the county court, sought to upset the judgment on the ground that the county court judge had no jurisdiction. It was held that not having relied on this in the county court, they could not rely upon it in this Court. But the want of jurisdiction there was not a want of jurisdiction of the county court as such; there was no question of a county court judge having exceeded his limited statutory jurisdiction; he had jurisdiction so far as the County Courts Act was concerned. There was no excess of jurisdiction. All that the Court held was that as arbitration had not been insisted on it was too late to insist on it when the case came before the Divisional Court on appeal.

Then did the defendants consent to the learned judge trying the action? And if so, did he obtain a jurisdiction which otherwise he would not have possessed, or are the defendants estopped from asserting that there was none? In my opinion there was no consent in fact to any enlargement of the learned judge's jurisdiction. No enlargement of jurisdiction was suggested. The defendants were submitting to the judge trying the action, not consenting to it. But even if there was consent, that does not, in my opinion, get rid of the difficulty. The jurisdiction is limited by statute, and power is given to the judge in some cases, and in some cases only, to try actions which are outside that jurisdiction if consent is given, and given in a formal way. Sect. 64 of the Act enables a county court judge to try certain actions if the parties consent and that consent is signified by a memorandum in writing. If it had been intended that whatever the nature of the case was the parties might consent to its being tried in a county court, the Legislature would not have provided that in this limited class of cases consent might be given. Sect. 67, which confers equity jurisdiction on a county court judge, makes no corresponding provision. It was said that s. 114 implies that parties may consent to any kind of case being tried in a county court. I do not think that one can extract this meaning from that section. One must read it in connection with s. 64 to which I have referred. It does

not purport to confer a general power to enlarge jurisdiction by consent. It deals with the power to award costs and nothing more. The section would really be satisfied by confining it to cases in which express power to consent has been properly given under s. 64, or possibly to cases where the action has been brought in the wrong district. Very large consequences would follow if we were to hold that any kind of action can be tried and a binding judgment given in a county court provided the parties to the proceedings consent to the Court trying it. Actions for a mandamus, or for a mandatory order to compel the performance of a public duty; actions to prevent the infringement of a patent; actions involving questions of franchise, are instances of cases with which a learned county court judge could lawfully deal if consent, express or implied, is given. In my opinion no general power to enlarge jurisdiction by consent is given by s. 114, and there is no such power.

Although not identical with this case, I think that the judgment of the Court of Appeal in *Farquharson* v. *Morgan* (1) supports this view. The Court there held that a county court judge who had, under an erroneous view, assumed jurisdiction in proceedings under the Agricultural Holdings Act ought to be prohibited from further proceedings, although the party applying for prohibition had consented to what had been done. It is true that that was a case of prohibition, but in my opinion the same principle applies to an appeal. I think that it applies to proceedings regulated by the County Courts Act as well as to proceedings under the Agricultural Holdings Act when the subject matter of the proceedings was altogether outside the jurisdiction of the Court.

For these reasons I think we ought to hold that the judgment was wrong and to enter judgment for the defendants in the form stated by my Lord, whose judgment I have had an opportunity of reading. I agree also as to costs. I would add that if further proceedings are taken—I have said nothing about the merits, as we cannot now deal with them—I would suggest that the parties agree to a fresh investigation by an

(1) [1894] 1 Q. B. 552.

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agreed tribunal. The plaintiffs, upon whom a serious stigma has been imposed, know now what the precise charge is and that difficulty has now been remedied.

Solicitors for plaintiffs: *W. C. Crocker, for Wood, Lord & Sumner, Whitehaven.*

Solicitors for defendants: *Helder, Roberts, Giles & Co., for H. Braithwaite, Whitehaven.*

R. F. S.

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May 24.

[IN THE COURT OF APPEAL.]

COMMISSIONERS OF INLAND REVENUE *v.* KOREAN SYNDICATE, LIMITED.

Revenue—Excess Profits Duty—Trade or Business—Limited Company—Object of Incorporation to acquire and work Concessions and turn the Same to Account—Lease of Concession in Consideration of Share of Profits—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* 5, *c.* 89), *ss.* 38, 39.

A company was incorporated as a limited company having for its principal object the acquisition and working of concessions and turning the same to account. In 1908 the company entered into an agreement to lease a concession in Korea which it had acquired in consideration of the lessees paying what was therein described as a royalty, but which was in fact a percentage based on the profits made by the lessees. The company also received the interest on a certain sum of money on deposit at a bank. The company's operations were confined to the collection and distribution of these two sources of income and to the payment of the premiums on a sinking fund policy:—

Held, upon the construction of the memorandum and articles and the agreement of 1908 that the company was carrying on the business for which it was incorporated—namely, the acquisition of concessions and the turning of the same to account—and was therefore carrying on a business within the meaning of s. 39 of the Finance (No. 2) Act, 1915, and was accordingly liable to be assessed to excess profits duty under that Act.

Decision of Rowlatt J. [1920] 1 K. B. 598 reversed.

APPEAL from a decision of Rowlatt J. (1) on a case stated under the Finance (No. 2) Act, 1915, s. 45, sub-s. 5, and the Taxes Management Act, 1880, s. 59, by the Commissioners for the Special Purposes of the Income Tax Acts.

(1) [1920] 1 K. B. 598.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on June 11, 1918, for the purpose of hearing appeals, the Korean Syndicate, Ld. (hereinafter called the Syndicate), appealed against assessments to excess profits duty on the sums of 1112*l.* 10*s.* and 1900*l.* 10*s.* for the accounting periods ended March 31, 1916, and March 31, 1917, respectively, made upon them by the Commissioners of Inland Revenue under the provisions of the Finance (No. 2) Act, 1915, Part III., and subsequent enactments.

The Syndicate was a company incorporated on January 19, 1905, under the Companies Acts. Among its objects as set forth in clause 3 of its memorandum of association were the following: (1.) To apply for, purchase or otherwise acquire concessions, rights and privileges of any and every kind for or in relation to mining, electrical, agricultural, land or water, or any other rights or purposes, or the construction, execution, carrying out, equipment, improvement, management, administration, or control of works of any kind in Korea or elsewhere, and to work, exploit, and turn the same to account, and in particular to enter into an agreement with reference to a mining concession which had been already granted by the Imperial Household Department of the Korean Government in the terms of a draft agreement which had been prepared and signed for identification by Harold Brown, of No. 2, Bond Court, Walbrook, in the City of London, Solicitor, and to carry the same into effect either with or without modification, or to enter into and carry out any other agreement with reference to such concession and to carry the same out as might be considered expedient. (3.) To carry on the business of miners, metallurgists and a number of other businesses mentioned, "and generally any business which can in the opinion of the Board be carried on to the benefit or advantage of the company." (8.) To receive money on deposit and to lend money to any company, partnership, association, or persons upon security of their undertaking, property, estate, assets and effects, or any part thereof, or without security, and generally upon such terms as the Board might deem expedient. (9.) To invest and deal with any

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moneys of the company not immediately required upon such securities and in such manner as might seem expedient. (15.) To improve, manage, work, develop and turn to account any property, real or personal, acquired by or in which the company was interested, and to sell, lease, convert into money, barter or otherwise dispose of, the undertaking, property, assets and effects of the company, or any part thereof, for such consideration as the company might think fit, and in particular, for shares, debentures or securities of any other company.

The material articles of association were the following :—

Art. 5 : "The business of the company may be commenced as soon after the incorporation of the company as the directors think fit, notwithstanding that the nominal capital may have been only partially subscribed."

Art. 91 : "The business of the company shall be managed by the directors who may exercise all such powers of the company and do on behalf of the company all such acts as are within the scope of the memorandum and articles of association of the company and as are not by the Statutes or by these presents required to be exercised or done by the company in general meeting."

Art. 125 : "No dividend instalment of dividend or bonus shall be payable except out of profits arising out of the business of the company or in excess of any amount recommended or approved by the Board."

The authorized capital of the Syndicate on its incorporation was 10,000*l.* The capital was twice subsequently increased, the maximum amount at any time being 14,364*l.* 10*s.* In 1912 the capital was reduced to its present figure of 9460*l.* 2*s.* The company had a sinking fund policy for 14,400*l.* payable after the year 1926, at an annual premium of 749*l.* 12*s.*, which the directors were by special resolution authorized to pay out of the profits arising from the business of the company.

The Syndicate upon its formation entered into the agreement referred to in the memorandum of association dated January 20, 1905, with the firm of Collbran & Bostwick

and became entitled to acquire an interest in a company called the American Korean Mining Co. The Syndicate's interest in this agreement was sold in 1907 in consideration of certain shares, debentures and bonds in the Korean Waterworks, Ld., which were held by the Syndicate up to the year 1911. During 1911 the Japanese Government purchased for cash the waterworks and the Korean Waterworks, Ld., accordingly went into liquidation and the money received by the Syndicate for its holding in the company was placed by the Syndicate on deposit with a bank. The amount received in cash from the Korean Waterworks holding in 1911 was 4591*l.*, and in the same year 900*l.* of it was applied to payment off of a loan and 494*l.* in payment to creditors and 158*l.* (being the profit difference between the sum at which the Syndicate valued the holding and the sum received for it) was passed through profit and loss account and distributed as dividend. This left a balance of 3039*l.*, which was included among the assets of the Syndicate in the balance sheet of October 31, 1911. In 1912 and 1913 this sum was drawn on for dividends in anticipation of royalties which it was known were about to be received, but the 3039*l.* was restored in its entirety in 1914 and had so remained ever since.

The Syndicate also acquired in February, 1905, a half right to a concession in Korea extending over 216 square miles on which was situated a gold mine known as the Su-An Mine. The title to this concession was granted by the Korean Government and was held jointly with the American firm of Collbran & Bostwick under the provisions of an agreement dated February 7, 1905.

By that agreement, which was annexed to and stated to form part of the case and which recited (inter alia) that the Syndicate had entered into certain arrangements with Collbran & Bostwick with reference to the exploitation and turning to account the concession (thereinafter referred to as "the Collbran Concession") and that the parties thereto were desirous of avoiding any possible conflict of interest which might arise between them in respect of the

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ownership and exercise of any rights granted and conferred by the Collbran Concession and any rights which had been or might be thereafter granted and conferred by the Su-An Concession if and when the same was duly confirmed, it was agreed (inter alia) as follows: Clause 3: "The Syndicate shall use their best endeavours to turn the said Su-An Concession to profitable account in such manner as they shall think to the best interest of all parties hereto and for that purpose shall be at liberty to assign or transfer to any persons who will in the opinion of the directors of the Syndicate secure the influence of the Japanese Government in obtaining and/or developing and turning to account the said Su-An Concession such share or interest in the said Su-An Concession as the directors of the Syndicate may consider desirable and they may effect such arrangement by concurring in the transfer of the said concession to any company which may be formed according to the laws for the time being in force in the United Kingdom of Great Britain and Ireland or in America or in Japan or in Korea as they may in their discretion think fit and in the allotment and issue and appropriation of share capital or debenture or other securities of any such company in such manner and in such amounts and proportions and generally in any such arrangements or terms as shall in the opinion of the directors of the Syndicate best operate to secure the confirmation of the said Su-An Concession and its development and turning to profitable account."

It had originally been intended that the Syndicate should itself develop and work the concession above referred to and should also obtain and develop other concessions for which preliminary negotiations had been made. These expectations were not fulfilled, and on March 25, 1908, the Syndicate entered into an agreement with reference to their share in the concession with a company named the Collbran-Bostwick Development Co. formed by the American firm. In the case this agreement was described as a "lease" and was stated to form part of the case. It was made between the Syndicate (thereinafter referred to as "the

lessors") of the one part and the company (thereinafter referred as "the lessees") of the other part, and after reciting (inter alia) that the lessees had become entitled to the one-half interest of Collbran & Bostwick in the concession, that the concession entitled the owners thereof to develop and work certain gold mines situate at Su-An, and that the lessees were desirous of obtaining the sole right to work the said property under the said concession which the lessors had agreed to grant on the terms and conditions thereinafter mentioned, it was witnessed (inter alia) as follows :—

Clause 1 : "The lessees shall, subject as hereinafter mentioned, be solely entitled to work and develop the said mining property situate at Su-An in the Province of Huang-hai in Korea for the whole of the said concession less the last three months thereof."

Clause 4 : "The lessees shall work and develop the said property in a proper and businesslike manner and with all reasonable diligence and shall keep the property in good working order and condition."

Clause 5 : "The lessees shall pay to the lessors by way of royalty or rent such a sum as shall be equal to eight per cent. of the net profit realised by the lessees from the working of the said property such net profit shall be arrived at by deducting from the gross proceeds realised from the sale of all gold and other precious substances extracted from the said property all costs charges and expenses incident to the working thereof and the extraction therefrom and refining and treating of the gold and other precious substances including the royalty payable to the Government and all outgoings charges and impositions and rates and taxes and assessments payable in respect thereof and also the costs of all insurances and the sale and disposal of the gold and other precious substances and generally all working costs of every description, but before charging anything for depreciation of plant or for interest on capital or for the depreciation of the property."

Clause 6 : "The lessees shall keep proper books of account and therein make full and sufficient entries of all work carried

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on by them on the said property and of all ore crushed and gold and other precious substances won therefrom and generally shall keep such books of account and other records of the work carried on on the said property as shall enable the lessors to ascertain the royalty payable to them as hereinbefore provided and an audit of these accounts shall be made every six months by a competent auditor who shall be mutually agreed to in correspondence."

Clause 11: "The lessors shall have the right to determine this agreement by giving the lessees written notice of their intention so to do in any of the following events, viz.:—

(*a*) If the lessees shall be guilty of any serious breach of the terms and conditions herein contained and shall fail or neglect to remedy such breach within six calendar months of receiving notice from the lessors requiring them to remedy or make good the same.

(*b*) If the lessees shall do suffer or permit any act matter or thing which shall render the said concession liable to be forfeited.

(*c*) If the share of the profits due to the lessors shall in any year after the first year from the date hereof be less than 250*l.* and the lessees shall not make up such share of profits to 250*l.* by paying to the lessors the deficiency within one month of the amount of such deficiency being ascertained."

Clause 12: "The lessees may determine this agreement by six calendar months' notice in writing to the lessors at any time at their registered office."

During the years which fell under review for the purpose of the assessments appealed against the income of the Syndicate had been derived solely from the interest on the bank deposit above referred to and from the royalties received under the lease of March 25, 1908.

The Syndicate employed as its agent a resident in Korea at a small retaining fee of some 25*l.* per annum, but unless the taking of steps to ascertain the true amounts of royalties

and interest receivable, the receiving of such amounts, and the distributing of the same amongst the members of the Syndicate were held to constitute the carrying on of a trade or business within the meaning of Part III. of the Finance (No. 2) Act, 1915, the Syndicate did not carry on any trade or business in the years under review. The assessments appealed against were made on the profits of the Syndicate computed in accordance with the Acts relating to excess profits duty. It was contended on behalf of the Syndicate that in the circumstances the Syndicate was not carrying on a trade or business within the meaning of s. 39 of the Finance (No. 2) Act, 1915. (1)

The Commissioners allowed the appeal and discharged the assessments appealed against. On appeal the decision of the Commissioners was affirmed by Rowlatt J.

The Commissioners of Inland Revenue appealed. The appeal was heard on May 24, 1921.

Sir Gordon Hewart A.-G. and *R. P. Hills* for the appellants. The Syndicate is a public company whose sole raison d'être is to have a business and carry it on. Prima facie any profits it makes must be profits of its business. The expression used in s. 39 of the Finance (No. 2) Act, 1915, is "trades or businesses." "Business" is a wider term than "trade." In *Harris* v. *Amery* (2) Willes J. said: "It is unnecessary

(1) Finance (No. 2) Act, 1915, s. 39: "The trades and businesses to which this Part of this Act applies are all trades or businesses (whether continuously carried on or not) of any description carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom, excepting:—

(*a*) husbandry in the United Kingdom; and

(*b*) offices or employments; and

(*c*) any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount,

but including the business of any person taking commissions in respect of any transactions or services rendered, and of any agent of any description (not being a commercial traveller, or an agent whose remuneration consists wholly of a fixed and definite sum not depending on the amount of business done or any other contingency)."

(2) (1865) L. R. 1 C. P. 148, 154.

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to refer to authorities to show that 'business' has a more extensive signification than 'trade.' The earlier Bankrupt Acts did not embrace farmers: but it was never doubted that farming was a 'business,' though not a 'trade.' Banking is not strictly a trade. Where land comes to a number of persons by operation of law, they cannot be said to be partners, and they may consistently with the Act farm it." That passage was cited with approval by Jessel M.R. in *Smith* v. *Anderson*. (1) And see per Lindley L.J. in *Rolls* v. *Miller*. (2) Having regard to the lease of March 25, 1908, it would appear that the Syndicate was itself working and exploiting the concession by receiving royalties on the minerals leased. The present case is distinguishable from *Inland Revenue Commissioners* v. *Marine Steam Turbine Co.* (3) There the undertaking had been sold and the company was being wound up, and the royalties receivable were in substance the purchase price of its undertaking, as was pointed out by Eve J. in *In re Clayton's Will Trusts*. (4) In the present case it cannot be suggested that the Syndicate has parted with its property. It has granted a lease of it and is receiving royalties under it, and is in the same position as if it had never granted a lease, but was working the concession itself. Rowlatt J. has not addressed his mind to this point, and it is submitted therefore that his judgment is wrong. It was put against the appellants that the royalties were in the nature of income from investments, but it is submitted that they were income from investments which the Syndicate was bound to make. Further the interest on deposit is a profit from an asset of the Syndicate and taxable like any other business profit of the Syndicate: *Liverpool and London and Globe Insurance Co.* v. *Bennett*. (5)

Clauson K.C. and *A. M. Latter* for the Syndicate. The decision of the Commissioners and Rowlatt J. was correct. No point was made in the Court below that these royalties were other than ordinary royalties. The point argued was

(1) (1880) 15 Ch. D. 247, 259.
(2) (1884) 27 Ch. D. 71, 88.
(3) [1920] 1 K. B. 193.
(4) Unreported, July 18, 1917.
(5) [1913] A. C. 610.

that if in such a case an individual would not be carrying on a business neither was the Syndicate.

[LORD STERNDALE M.R. My difficulty is to see why this was not a turning of the concession to account ?]

The reasons given by the judge in the *Marine Steam Turbine Case* (1) are important on this point.

[YOUNGER L.J. If the royalties in your case are to be treated as rent there is no difference between it and the *Marine Steam Turbine Case.* (1)]

If an individual is not carrying on a business in what he is doing and you substitute for him a company that does not make any difference as regards liability to tax. A mere owner of property is not carrying on a business. The only activities the Syndicate was carrying on was receiving the royalties and distributing them. The only point in this case is whether or not it is right to say that if a company's activities are confined to checking and distributing its dividends it is carrying on a business for the purposes of excess profits duty. Here the royalties received by the Syndicate are calculated with reference to the profits made by the lessees and the only function performed by the Syndicate is to check the amount of the royalties : see clause 5 of the lease of March 25, 1908. If the profits fall below a certain amount provision is made for the payment of a minimum royalty : see clause 11 (*c*).

[YOUNGER L.J. referred to Sch. IV., Part I., r. 8, of the Finance (No. 2) Act, 1915.]

That rule refers to trust companies whose business it is to make investments. The Act does not tax the company but the business. It therefore does not tax the income of a reserve fund. The question is whether on the facts stated in the case there is a business within the meaning of s. 39 of the Act of 1915 which the Syndicate is carrying on. If all it does is to receive these royalties and the interest on the deposit it is not, it is submitted, carrying on a business. The total income of the Syndicate is the result of the ownership of property. The existence of r. 8 of Part I. of Sch. IV.

(1) [1920] 1 K. B. 193.

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of the Act is no detriment to the present argument. The fact that the person sought to be taxed is an individual and not a company makes no difference. The case must be treated as if the Syndicate were a mere individual and an owner of property. On the construction of the agreement of March 25, 1908, it is submitted that the Syndicate was not jointly concerned with the lessees in carrying on a business. The agreement is in common form and is not consistent with the exercise of any control by the Syndicate. The provisions as to the determination of the lease by the lessors are strictly limited: see clause 11. The payment under the lease is a rent and nothing else: *Walsh* v. *Lonsdale* (1); *Daniel* v. *Gracie*. (2)

There is great distinction between leasing an undertaking and leasing land. The provisions in the lease are the common provisions contained in a mining lease, the only difference being that the method of payment is based on the amount of the profits.

[YOUNGER L.J. The agreement is not a demise, but rather a release by the Syndicate to its co-owners for a term of years.]

In order to make the Syndicate liable as carrying on a business it must be shown that it is working this concession itself or through its agents. It would be impossible under this agreement for any person to sue the Syndicate. On the facts found it is submitted that the Syndicate is not carrying on a business. In considering whether it is doing so or not the Court must look at what it is in fact doing and not at what it has power to do. *Mitchell* v. *Egyptian Hotels* (3) shows that if there is a residuum of control left in the Syndicate, which is not in fact exercised, the Syndicate is not carrying on a business. On the construction of the Act of 1915 it is submitted that "business" in s. 39 must mean something ejusdem generis with trade—that is, business in the nature of a trade: *Muat* v. *Stewart*. (4) In *Inland Revenue Commissioners* v. *Sangster* (5) it was held

(1) (1882) 21 Ch. D. 9.
(2) (1844) 6 Q. B. 145.
(3) [1915] A. C. 1022, 1037, 1039.
(4) (1890) 2 Tax Cas. 601.
(5) [1920] 1 K. B. 587.

with regard to a patentee who received royalties from licences granted by him of his patented articles which he did not manufacture or sell himself, that he carried on no business and earned no profits. There is here no evidence of any business to let concessions. The Syndicate has only one. What the Syndicate is doing it is doing as owner, and is not in fact working the concession.

[They also referred to the Customs and Inland Revenue Act, 1878, s. 13, sub-s. 2; Finance (No. 2) Act, 1915, s. 42, sub-s. 1, s. 43.]

R. P. Hills was not called upon to reply.

LORD STERNDALE M.R. In my opinion this appeal should be allowed. One difficulty which struck me at the outset, and the only one in the case, I think, is whether the question raised in this case was one of fact on which the Commissioners have arrived at a finding with which we cannot interfere. I do not think that is so on looking at what they have done and the way in which they have stated the case. They have arrived at their finding, as for my part I think, by misdirecting themselves, in which case we have a right of revision. They have in fact, it seems to me, entirely ignored the effect of the agreement between the Syndicate and the American company, and having done that they have come to a conclusion of fact upon the memorandum and articles and conduct of the company, and then merely say: "Well, now, apart from that agreement, what did the Syndicate do? It simply had an agent who for a payment of 25*l.* a year out in Korea ascertained whether it was getting the right sum. That is not carrying on a business." That is their only finding of fact; and if they mean, as I think they do, to say that that is not carrying on a business, and therefore that the Syndicate did not carry on a business at all, in my opinion they came to that conclusion by a wrong appreciation in law of the effect of the document before them.

The Syndicate was incorporated in 1905. Clause 3 of its memorandum of association states the objects for which it was established. [His Lordship read sub-clauses (1), (3),

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(9) and (10) of clause 3 and continued :] Those were the objects with which the Syndicate came into existence ; those are the objects for which its members associated themselves together, and those are the objects for which the capital of the Syndicate was raised.

Now I quite agree that those are only objects, and although the Syndicate may do those things it is not obliged to do them ; in fact, reading this memorandum, and most memoranda of association, it would be impossible for any single company to carry out all the objects which it is empowered to carry out.

Then the articles provide as follows : [His Lordship read arts. 5 and 91 and continued :] Now what is the business referred to in the memorandum and in the articles ? It seems to me that it is the business of doing what is necessary to carry out the objects which the Syndicate elects to carry out. That is how the Syndicate itself describes its business, although it does not necessarily follow that it is the right description of it. On January 20, 1905, the Syndicate entered into an agreement with a firm of Collbran & Bostwick, under which it became entitled to acquire an interest in a company called the Korean Mining Company. That interest was subsequently sold in consideration of certain shares in the Korean Waterworks, Ld. These shares were bought by the Japanese Government for cash and a certain amount was paid to the Syndicate, of which there now remains a sum of 3039*l.*, which is placed on deposit at a bank and the Syndicate is receiving the interest on that deposit. That is a small matter compared with the other matter with which we have to deal.

The Syndicate acquired in February, 1905, a half interest in a concession in Korea extending over 216 square miles, on which was situated a gold mine called the Su-An Mine. That, of course, was exactly a carrying out of the object stated in sub-clause 1 of clause 3 of the memorandum of applying for, purchasing, or otherwise acquiring concessions in regard to mining. That interest was also held jointly with the same firm of Collbran & Bostwick under the terms of an agreement

of February 7, 1905, which is made part of the case; and I notice that there is a recital in that agreement that the Syndicate had entered into certain arrangements with Collbran & Bostwick with reference to the exploitation and turning to account of the said concession. Then in the operative part of the agreement there is this provision: "The Syndicate shall use their best endeavours to turn the said Su-An concession to profitable account in such manner as they shall think to be the best interest of all parties thereto and for that purpose shall be at liberty to assign and transfer to any persons." Apparently it was stated before the Commissioners by one of the directors that originally the Syndicate had meant to work these mines itself, but eventually it came to the conclusion that it would not do so. On March 25, 1908, the important agreement in this case was executed. The Commissioners, in their case, call it a "lease." In my opinion it was not a lease strictly speaking at all. They also speak of the "royalties" which were received under this lease. The sums received were so called in the agreement, but they differ from ordinary royalties, as I shall point out. The words "lease" and "royalties" are in my opinion used very loosely indeed, as also are the words "lessors" and "lessees," which I find used in the same agreement, because the Syndicate in that agreement is called "the lessors" and the Collbran & Bostwick Development Co. are called "the lessees." [His Lordship referred to the recitals and read clauses (1), (4) and (5) of the agreement, and continued:] The royalty there referred to is not like an ordinary royalty at all, nor is this transaction in the least like an ordinary transaction of a mine owner granting a lease of a mine in return for what is called a royalty—that is, an amount payable upon the output, not upon the net profit at all. In my opinion this agreement is not governed in any way by any question of what are ordinarily called mining royalties. There are other provisions in the agreement. [His Lordship read clauses 11 and 12 and continued:] That is the agreement which the Commissioners call a lease. I do not think they meant in any way to beg any question

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by calling it so; they thought it was a convenient term by which to describe it. As I have said, in my opinion it is not a lease, nor are the sums payable under it in any way like the royalties that are paid under an ordinary mining lease. The Commissioners offer no opinion at all as to what is the effect of that agreement.

In my opinion the effect of that agreement is that it is a carrying out of the object which the Syndicate undertook to attain, and which is mentioned in sub-clause 1 of clause 3 of memorandum which I have already read, of acquiring a concession and working, exploiting and turning the same to account, the same words as are used in the agreement of February 7, 1905. That is not in any way like the case of a person who holds certain investments and merely draws the interest from them, or of an owner of mines who simply leases them in consideration of the payment to him of royalties. It is nothing in the least like either of those cases, but it is a carrying out of that object mentioned in the memorandum, and which the Syndicate hopes to attain.

Now is that a case in which excess profits duty has to be paid? In order to see that, one has to look at s. 39 of the Finance (No. 2) Act, 1915, coupled of course with the charging section, s. 38, which I do not think it necessary to read again. Sect. 39 provides that "The trades and businesses to which this Part of this Act applies are all trades or businesses (whether continuously carried on or not) of any description carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom, excepting"—and then follow certain exceptions, none of which has any relevance to the present case. The word "business" as defined in that section is therefore the governing word here, and it has the widest possible meaning. It is a trade or business of any description owned or carried on in any other place than the United Kingdom by persons ordinarily resident in the United Kingdom. It seems to me that if a company comes into existence for the very purpose of acquiring concessions and turning them to account, it is impossible to say that that is not such

a business as is contemplated by and referred to in s. 39 of the Act.

A great deal of argument was addressed to us to this effect. If in this case the Syndicate was an individual, he would not be carrying on a business, and there can be no difference for this purpose between an individual and a limited company. I do not assent to either of those two propositions. I do not think it would have been at all clear, if the Syndicate were an individual, that he was not carrying on a business; and for this reason. You would have to see what he was doing and why he was doing it, and if he was doing it under the circumstances in which the Syndicate was doing it—namely, trying to attain the object of acquiring a concession and turning the same to account—then I think he might very well be carrying on a business. I do not admit, either, that there can be no difference for this purpose between an individual and a company. If once you get the individual and the company spending money on exactly the same basis, then there would be no difference between them at all. But the fact that the limited company comes into existence in a different way from that in which an individual comes into existence is a matter to be considered. An individual comes into existence for many purposes, or perhaps sometimes for none, whereas a limited company comes into existence for some particular purpose, and if it comes into existence for the particular purpose of carrying out a transaction by obtaining concessions and turning them to account, then that is a matter to be considered when you come to decide whether doing that is carrying on a business or not.

For those reasons, therefore, I think that both the learned judge and the learned Commissioners were wrong. I think they were wrong, because they took no notice at all of the agreement of March 25, 1908. They put it on one side and said: "All that we have here is that the Syndicate has an agent in Korea to see that it gets the proper sum of money, and that is not carrying on a business." It may very well be that that particular action by itself would not be carrying on a business; but if you couple that with what it was doing

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under the memorandum and articles and under the agreement of March 25, 1908, then it seems to me that the only conclusion at which it is possible to arrive is that the Syndicate was carrying on a business of acquiring concessions and turning them to account. The Syndicate is still in existence, and is carrying on business, and there is no question of winding it up; the agreement has some considerable time still to run; and it might very well be said that all that was here done was merely part of a general business of acquiring concessions.

There is, in my opinion, a difference, and one which, had it been insisted upon, might have been an important one between the royalties (and what I have hitherto said applies only to the royalties so-called) and the interest on the money on deposit. I do not think it is necessary to go into the facts with regard to that interest. There might, in my opinion, be considerable differences, but I by no means say that the Syndicate would necessarily have been right on that point. But I do not propose to deal with it, because I think the Attorney-General is right in saying that no attempt was made to differentiate between the royalties and the interest, and that the case proceeded before the Commissioners and before the learned judge and throughout upon the basis that if the Syndicate was carrying on a business these two matters stood or fell together. That is the conclusion that I should draw from the way in which the case is stated. Therefore I do not think it necessary to draw any distinction or say anything about what might be the case in other circumstances, with regard to the interest on the deposits. It is a very much smaller part of the matter, and for these reasons I do not think it is necessary to deal with it.

I think the appeal should be allowed, and judgment will be for the Crown with costs here and below.

ATKIN L.J. I agree. The only question in this case appears to me to be whether the Syndicate is carrying on a business of any description within the meaning of s. 39 of the Finance (No. 2) Act, 1915, and if I think it is carrying on any business, then, as I read the case, there is no question

but that it is properly assessed to excess profits duty to the right amount in respect of profits arising out of that business.

Now I quite agree that it does not necessarily follow that because a company is incorporated under the Companies (Consolidation) Act, 1908, it is carrying on a business. The Act allows any number of persons, associated together for any lawful purpose, to be registered in accordance with its provisions, and one knows that a company may be registered for professional purposes, or as what is called in the Act an association for purposes not for gain; but in this case there is a Syndicate formed by an association of persons clearly for a profit, and the purpose for which they are associated is described by it in its memorandum as that (inter alia) of acquiring concessions and turning them to account for the purpose of making a profit, which it may distribute amongst its shareholders; and, having taken those powers, it has in fact availed itself of them, and that is the course it has adopted. It has acquired concessions, and it has turned them to account, and the profits that arise in this matter are profits that arise from its so turning them to account. It seems to me that it does not at all matter how it chooses to turn them to account. In this case, dealing with the question of the mining concession, it has obtained a part share in a very important concession in Korea which gives it the right to prospect over a very large area, and exclusive rights of working minerals within a particular district in that area. That concession it proposed at one time to work itself and with its own capital, and if it had done that, no question at all would have arisen; but after some two or two and a half years it came to the conclusion that it would not be advantageous to it to do so, and it therefore proceeded to do what many persons have done as a matter of business before—namely, instead of working its rights with its own capital, it handed them over to another company to work, on the terms that the Syndicate would receive an annual payment. I think it matters very little what that annual payment is called or how it is calculated, and in the case of a company of this kind to my mind it would make no difference whether

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the payment was based upon a calculation of the output or was a mere rent; but in fact in this case the payment is called, in the agreement of March 25, 1908, a sum equal to 8 per cent. of the net profit, and in the other part it is called a share of the profits, but whatever way it was, it was the way in which the Syndicate chose to make a profit. It made it by turning this concession to account in this way, and it has received annually, and still receives, a regular sum, and that sum, together with the other income that is received from a sum of money that it has made placed on deposit, it distributes as profits, and it distributes them as a dividend amongst the shareholders on the terms of an article (art. 125) which provides that no dividend shall be payable except out of profits arising out of the business of the company.

Now I myself have no difficulty in coming to the conclusion that the Syndicate is in fact carrying on a business, and that it has carried on a business of receiving the profits from the concession, in which it still retains an interest. It is true that it may be called, if you please, a passive carrying on of a business as opposed to an active carrying on of a business; but I for my part think with regard to the definition of "business" given by Rowlatt J. in *Inland Revenue Commissioners* v. *Marine Steam Turbine Co.* (1), if it was really intended for a precise definition, that the form in which it was expressed would be too narrow. He there said: "The word 'business' however, is also used in another and a very different sense, as meaning an active occupation or profession continuously carried on, and it is in this sense that the word is used in the Act with which we are here concerned." Personally if any emphasis is attached to the word "active," I think it would narrow the meaning of the word "business"; for I see nothing to prevent a holding company—holding being a well-known method of carrying on business in these days—from carrying on a business. It is unnecessary to consider the effect of the Act on such companies, because it may be that they are protected in another way; but there is nothing

(1) [1920] 1 K. B. 193, 203.

in the Finance (No. 2) Act, 1915, which says that the business must be actively carried on.

I think, therefore, that the Syndicate is in fact carrying on a business and is making profits out of the carrying on of a business, and therefore it was properly assessed. Having arrived at that conclusion, I am glad to know that that must be the view that the Syndicate itself formed of what it was doing until this question of excess profits duty arose, because its articles of association speak of its carrying on a business. The Syndicate has no right to distribute a dividend except out of profits arising out of its business; and in fact it made a claim before the Commissioners for a rebate in respect of income tax, on the footing that it was a company whose business consisted mainly in making investments. Therefore I think it will not be a surprise to it to have it determined that it is carrying on a business.

I agree with what has been said by the Master of the Rolls in reference to the question as to the interest on the deposit. No separate question arises here as to that, and that source of income, like that of the income derived from the mining concession, must be treated as profits of the company, and therefore the whole of this assessment must be affirmed.

YOUNGER L.J. I am of the same opinion. I think that in the last analysis the real question here is whether this agreement of March 25, 1908, is what apparently it was regarded by the Commissioners as being—merely a lease of this Syndicate's interest in this concession, at a royalty, or whether it is not the embodiment of an arrangement by virtue of which the Syndicate turned to account its interest in this concession, an interest which it had acquired for the purpose of turning it to account and thereby earning profit for itself. It seems to me that the latter is the true view of the arrangement embodied in the agreement.

The history of this concession may be shortly stated. After the Syndicate was formed, it apparently emerged that there were then pending for this particular concession negotiations between the Korean Government and the American firm,

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the vendors to the Syndicate under an earlier agreement; it appeared that if this concession were granted to the American firm, there might be some conflict between the rights enjoyed by the Syndicate under its first agreement with that firm and those which would be possessed by the American firm under this new concession; accordingly the agreement of February 7, 1905, referred to by the Commissioners was entered into. The effect of that agreement, as I read it, is that this concession, then being negotiated for on behalf of the American firm, was to be transferred to the Syndicate, so that it was to become the sole owner of the concession as between itself and the Korean Government, but so that the respective beneficial interests of the American firm and the Syndicate in the concession were to be interests in moieties. The Syndicate, however, was left in control; and clause 3 of the agreement is a provision that the Syndicate shall use its best endeavours to turn the concession to profitable account in such manner as it shall think to the best interest of all parties, and that for that purpose it may transfer the concession to any company which may be formed and do various other things, with the result that anything received in respect of those activities by the Syndicate was to be divided between itself and the American firm in equal shares.

Now it seems that between 1905 and 1908, the year of the agreement which is now in question, the expectations which in 1905 had been formed as to the possibility of the Syndicate itself turning the whole concession to profitable account had not materialized, and accordingly this agreement of March 25, 1908, was entered into, whereby in effect it is provided that the concession, instead of being worked by the Syndicate, is to be worked by the American company—the risk is transferred from one to the other—and, putting it broadly, the terms on which the concession is to be so worked are that the Syndicate, instead of retaining one-half, is to receive 8 per cent. only of the profits produced by the working. The agreement, although there are words and phrases in it which indicate that it is, or was regarded as being, a lease,

is, in my opinion, in no real sense a lease at all, but is in the fullest sense a turning to account by the Syndicate of its interest in the concession, through an arrangement under which it was to receive, as a result, this proportion of the profits of working the concession.

Now the purpose of the Syndicate was, amongst other things, to apply for concessions in Korea and elsewhere, and to turn the same to account. It appears to me that if the true view of this document of March 25, 1908, is that it was a turning to account for the profit of the Syndicate of this concession obtained by it from the Korean Government in pursuance of the power taken by sub-clause 1 of clause 3 of its memorandum of association, we have here in truth and in fact a transaction in the business of this Syndicate carried out, if you will, in England, within the meaning of s. 39 of the Finance (No. 2) Act, 1915, the profits arising from which are liable to excess profits duty by virtue of that statute.

Appeal allowed.

Solicitor for appellants: *The Solicitor of Inland Revenue.*
Solicitors for respondents: *Linklater & Co.*

W. I. C.

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FRENCH AND ANOTHER *v.* GETHING.

GETHING, CLAIMANT.

[1920. F. 1223.]

Bill of Sale—Registration—Gift of Furniture by Husband to Wife—Possession—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 8—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 10.

By a post-nuptial deed dated May 4, 1914, the defendant, in consideration of natural love and affection, gave to his wife the furniture in his dwelling house. The deed was not registered under the Bills of Sale Act, 1878, and the furniture remained in the house occupied by the defendant and his wife. In 1920 the plaintiffs obtained judgment against the defendant and proceeded to levy execution at his house when they were met by the wife's claim to the furniture. In an interpleader issue between the wife and the execution creditors:—

Held, (1.) following *Ramsay* v. *Margrett* [1894] 2 Q. B. 18, that the wife, having the legal title, had possession of the furniture so as to take the case out of the Bills of Sale Act, 1878; and (2.) that the furniture was not in the order and disposition or reputed ownership of the defendant within that part of s. 10 of the Married Women's Property Act, 1882, which provides that "nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband."

Semble, the foregoing provision of s. 10 applies only in the case where a husband and wife are living together on premises on which the husband carries on business.

APPEAL from Master Whateley on the trial of an interpleader issue.

The plaintiffs, who were the executors and trustees of one Hart, who had been in partnership with the defendant, Samuel Gething, obtained judgment in 1920 against the defendant for 622*l.* and costs. As the judgment was not satisfied, the plaintiffs proceeded to levy execution at the house occupied by the defendant and his wife, and of which he was the rated occupier, but were met by a claim on behalf of the wife (hereinafter called "the claimant") to the furniture by virtue of a deed of gift executed by the defendant on May 4, 1914. By that deed, after a recital that no settlement had been made upon the marriage of the defendant and the claimant, the defendant, in consideration of the natural

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love and affection which he had for the claimant, gave and made over to her the furniture and other effects in and about his dwelling house for her absolute use and benefit and as her separate estate and property. The deed was not registered under the Bills of Sale Act, 1878, and the furniture remained in the house after as before the execution of the deed. In view of the claim an interpleader issue was tried, when the Master decided that the deed of May 4, 1914, was a genuine deed, and that under it the claimant was entitled to the furniture and effects in the house, with certain immaterial exceptions, as against the execution creditors, she being, within the principle laid down in *Ramsay* v. *Margrett* (1), in possession of the furniture.

The execution creditors appealed.

A. Ralph Thomas for the execution creditors. The Master was wrong in holding that this case was governed by *Ramsay* v. *Margrett*. (1) In that case there was a sale by the husband to the wife of the chattels in the house by a bargain independently of the document which was said to be a bill of sale. Here there was no consideration moving from the wife, there was no change of possession of the furniture, and the deed of gift not being registered is void as against the execution creditors. The claimant cannot pray in aid the deed of gift, which is void as against the execution creditors, in order to establish a legal title and so shift the possession to herself. In *Ashton* v. *Blackshaw* (2) Malins V.-C. said: "If there be any attempt to change the ownership by a bill of sale there must be a registration, or there is no change of ownership, and the property remains in the apparent owner"—in this case, the judgment debtor. The Master gave no effect to s. 4 of the Bills of Sale Act, 1878, which provides (inter alia) that "personal chattels shall be deemed to be in the 'apparent possession' of the person making or giving a bill of sale, so long as they remain or are in or upon any house . . . . occupied by him . . . . notwithstanding that formal possession thereof may have been taken by or given to any other person." In

(1) [1894] 2 Q. B. 18. (2) (1870) L. R. 9 Eq. 510, 519.

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this case not even formal possession was given to the claimant. In *In re Emery* (1) in a transaction very similar to that effected by the deed of gift in this case the Court held that the furniture was in the actual or apparent possession of the debtor: see also *Ex parte Jay* (2); *Ex parte Saffery.* (3) [He also referred to *Hollinshead* v. *Egan.* (4)]

Secondly, this transaction is invalidated by the latter part of s. 10 of the Married Women's Property Act, 1882, which provides that "nothing in this Act contained shall give validity as against creditors of the husband, to any gift, by a husband to his wife, of any property, which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband." The Master gave no decision upon this point and, even assuming the first point to fail, the case should be sent back for this point to be dealt with.

Wynn Werninck (*Disturnal K.C.* with him) for the claimant. The first point is covered by *Ramsay* v. *Margrett.* (5) There Lord Esher M.R. said (6): "The goods were in the house in which the husband and the wife were living together, and in that state of things you could not say which of them had the actual possession of the goods. What is the rule of law as to possession in such a case? When the possession is doubtful it is attached by law to the title. Therefore, under such circumstances, the law considers the goods to be in the possession of the wife, who has the legal title to them." That language exactly applies to the facts of this case. The title to the furniture passed to the claimant by the deed of gift and thereupon the possession was in her.

With regard to the second point: s. 10 of the Married Women's Property Act, 1882, does not invalidate the gift of the furniture to the claimant. In order that that section should apply, the property must "continue to be in the order and disposition or reputed ownership of the husband." Those words, which are taken from the Bankruptcy Acts, relate to goods in the sole possession and sole reputed ownership of the

(1) (1888) 21 Q. B. D. 405.
(2) (1874) L. R. 9 Ch. 697, 704.
(3) (1881) 16 Ch. D. 668, 671.
(4) [1913] A. C. 564, 583.
(5) [1894] 2 Q. B. 18.
(6) Ibid. 25.

debtor: see *Ex parte Dorman* (1) and *In re Bainbridge* (2)— and this was not the case with reference to the furniture in question, the furniture having clearly passed into the sole possession of the claimant upon the execution of the deed of gift.

A. Ralph Thomas replied.

LUSH J. In this case, which has been well argued on both sides, the execution creditors appeal from the decision of Master Whateley on the trial of an interpleader issue, and on their behalf two points have been taken; first, that the deed of gift of May 4, 1914, from the judgment debtor to his wife, the claimant in these proceedings, is a bill of sale within the Bills of Sale Act, 1878, and that not having been registered it is void as against them; and secondly, that, even if that is not so, the execution creditors are entitled under s. 10 of the Married Women's Property Act, 1882, to avoid the gift. We are told that the Master gave no decision upon the second point, and we are asked at all events to send the case back to him to have that question dealt with.

As to the first point, it is clear that the deed of gift of May 4, 1914, was a bill of sale, but it is clear also that, although not registered, it conferred a good title to the furniture on the wife. All that s. 8 of the Bills of Sale Act, 1878, does is to invalidate an unregistered bill of sale or render it inoperative so far as execution creditors and certain other classes of persons are concerned if the goods affected by the document are, after seven days, in the possession or apparent possession of the grantor. The section does not otherwise touch the validity of the deed, and, therefore, so far as the title to the goods is concerned, the claimant made out her title. The furniture being in the house in which the judgment debtor and the claimant are residing, *Ramsay* v. *Margrett* (3) is said on behalf of the claimant to decide the case in her favour. On the other hand it is said for the execution creditors that the facts in *Ramsay* v. *Margrett* (3) and in this case are entirely different,

(1) (1872) L. R. 8 Ch. 51. (2) (1878) 8 Ch. D. 218.
(3) [1894] 2 Q. B. 18.

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as no doubt they are, and that the judgment of the Court of Appeal in that case does not cover this case. In my opinion *Ramsay* v. *Margrett* (1) covers this case, and the difference in the facts is for this purpose wholly immaterial. It is true that in *Ramsay* v. *Margrett* (1) the Court was not considering the case of a gift by a husband to his wife; in that case there was a sale which the Court held to be effective without the aid of the document there in question, which admittedly was a bill of sale within the meaning of the Act; but the majority of the Court, Lord Esher M.R. and Davey L.J., Lopes L.J. expressing no opinion on the point, distinctly held that upon the hypothesis that there was a bill of sale, and that the wife's title depended upon it, still, inasmuch as the husband and wife were both residing in the house in which the furniture in question was, the furniture was just as much in the possession of the wife as it was in that of the husband. It was clearly laid down that where the possession is a mixed possession, possession follows the title. To ascertain who is in possession of the goods after the execution of the deed one has to ascertain to whom they belong. If the title was in the husband before the execution of the deed the possession was then in him, but if the deed was a good deed and conferred a good title upon the wife, the possession, following the title, became that of the wife. The same principle applies in the case of any other member of the family of the grantor or in the case of any visitor stopping in the house. Each owner of goods resident in the house is in possession of his goods; he is not required to carry them about with him or to lock them up in a separate part of the house; he cannot do more than allow them to remain where they are, and possession follows the title. Again, the Bills of Sale Act, 1878, has nothing to do with the question whether the assurance is a voluntary assurance or an assurance for value; the instrument is just as much a bill of sale in the one case as in the other, and therefore the fact that in *Ramsay* v. *Margrett* (1) there was a sale, and the fact that in this case there was not a sale but a gift, affords no ground for distinguishing between the two cases. In my opinion it is quite

(1) [1894] 2 Q. B. 18.

clear that, taking this deed of gift as a good deed, as it is, the goods belonged to the wife upon its execution, and they then came into, and still remain in, her possession.

Sect. 8 of the Bills of Sale Act, 1878, provides that an unregistered bill of sale shall, as against certain persons, be deemed fraudulent and void "so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which, at or after the time . . . . of executing such process . . . . and after the expiration of such seven days are in the possession or apparent possession of the person making such bill of sale . . . . "; and s. 4, so far as material, says that "personal chattels shall be deemed to be in the 'apparent possession' of the person making or giving a bill of sale, so long as they remain or are in or upon any house . . . . or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person." It has been suggested that this part of s. 4 was not brought to the notice of the Court in *Ramsay* v. *Margrett*. (1) The section was certainly called to the attention of the Court, which must have been aware of that part of it which I have just read; and it was decided that possession follows title, and therefore that the person who was entitled to the goods had possession of them. It is quite obvious what the expression "apparent possession" means in s. 4 and s. 8. It is used in contradistinction to formal possession; and the word "apparent" means open, visible possession. No doubt the word "apparent" is sometimes used in contradistinction to actual, as when an agent is said to have apparent authority; but here "apparent possession" is used in express contrast to formal possession, which sometimes is taken by symbolical delivery. The judgment of Lush L.J. in *Ex parte Saffery* (2) points this out. He there says: "With regard to the question which arises upon the Bills of Sale Act, the case has been argued as if 'apparent possession' would defeat the bill of sale although the actual possession had been taken out of the grantor.

(1) [1894] 2 Q. B. 18. (2) 16 Ch. D. 668, 671.

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But if the grantee of a bill of sale chooses not to register it, but takes actual possession of the goods within the seven days allowed for registration, his title is as good as if the deed had been registered. There used formerly to be a practice of giving symbolical possession under a bill of sale by handing over a chair or something of that sort in the name of the whole of the goods, or putting a person on the premises as one of the bankrupt's family, leaving the grantor as much the apparent owner of the goods as he was before the execution of the bill of sale. It was against such transactions that the words 'apparent possession' in the Act were aimed." In other words, where the open, visible possession still remains in the grantor it does not matter that some symbolical delivery has been effected. Though formal possession may have been given, the bill of sale is deemed to be fraudulent and void as against the execution creditors or the trustee in bankruptcy if open, visible possession continues in the grantor. Therefore what the execution creditors would have to prove in this case in order to succeed is that these goods were in the apparent possession of the husband in the sense I have explained. They failed to prove this, because, as I have said, the title to the goods was in the wife, and that being so, possession follows the title. The Master was therefore right in holding that the furniture in question was not in the apparent possession of the judgment debtor at the time of the seizure by the sheriff.

With regard to the second point, this is, so far as I know, the first occasion on which the meaning of the latter part of s. 10 of the Married Women's Property Act, 1882, has come before the Court. It is a somewhat singular section. After dealing with investments which a wife has made out of her husband's money without his consent, it continues: "Nothing in this Act contained shall give validity as against creditors of the husband, to any gift, by a husband to his wife, of any property, which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband." It will be observed that those words of the section relate only to gifts; and the language differs from that of s. 8 of the

Bills of Sale Act, which speaks not of "reputed ownership" but of "apparent possession." Further, s. 8 is not confined to gifts. Although before the earliest of the Married Women's Property Acts was passed a married woman was permitted in Courts of equity to retain as part of her separate estate moneys she acquired in the course of carrying on a separate trade or business, and although the right of a wife to carry on a separate trade or business is expressly recognized by the Married Women's Property Acts, it is singular that there is no corresponding provision in s. 10 dealing with a married woman trader who makes gifts to her husband of property of which she as a trader would be the reputed owner. The language of s. 10 has obviously been borrowed, although not exactly, from the Bankruptcy Acts. For instance, in the Bankruptcy Act, 1869, goods are spoken of as being in the possession, order, or disposition of the trader. The word "possession" is omitted in s. 10. Again, the Bankruptcy Act is confined to cases where the property is in the possession, order or disposition of the trader with the consent of the true owner. No such expression occurs in s. 10. What is the meaning of s. 10? The draftsman had clearly in mind the proposition which was afterwards applied in *Ramsay* v. *Margrett* (1) to the case of two persons in the common occupation of premises in which the goods are, that possession follows title; so he has not said that: "Nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift, shall continue to be in the possession of the husband." If he had said that the difficulty would have arisen at once that the title decides the possession, and so made the section ineffective. As I have said, he has borrowed part of the language of s. 10 from the Bankruptcy Act, and substituted for the word "possession" the expression "in the order and disposition or reputed ownership" of the husband. Those words almost of necessity import that the husband who ex hypothesi has made a gift to his wife is carrying on a business of some sort. It is quite clear that

(1) [1894] 2 Q. B. 18.

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property in the mixed possession of two persons is not property of which the husband can be said to be the reputed owner any more than it can be said to be in the reputed ownership of the wife. Ownership of the goods cannot be inferred from the fact that the husband is rated as the occupier of the house in which they are. The meaning of "reputed ownership" and what must be proved to establish that a particular person is the reputed owner of goods was discussed by Lord Selborne in *Ex parte Watkins* (1), and I shall read this passage because it assists in ascertaining the meaning of s. 10. Lord Selborne said this (2): "The doctrine of reputed ownership does not require any investigation into the actual state of knowledge or belief, either of all creditors, or of particular creditors, and still less of the outside world, who are no creditors at all, as to the position of particular goods. It is enough for the doctrine if those goods are in such a situation as to convey to the minds of those who know their situation the reputation of ownership, that reputation arising by the legitimate exercise of reason and judgment on the knowledge of those facts which are capable of being generally known to those who choose to make inquiry on the subject. It is not at all necessary to examine into the degree of actual knowledge which is possessed, but the Court must judge from the situation of the goods what inference as to the ownership might be legitimately drawn by those who knew the facts. I do not mean the facts that are only known to the parties dealing with the goods, but such facts as are capable of being, and naturally would be, the subject of general knowledge to those who take any means to inform themselves on the subject. So, on the other hand, it is not at all necessary, in order to exclude the doctrine of reputed ownership, to show that every creditor, or any particular creditor, or the outside world who are not creditors, knew anything whatever about particular goods, one way or the other. It is quite enough, in my judgment, if the situation of the goods was such as to exclude all legitimate ground from which those who knew anything about that situation could infer the ownership to

(1) (1873) L. R. 8 Ch. 520. (2) Ibid. 528.

be in the person having actual possession." In most, if not in all, of the cases in which this question of reputed ownership under the Bankruptcy Act has been discussed a business has been carried on, and it seems to be clear that when the Legislature used this language in s. 10 of the Act of 1882 and spoke of property continuing to be " in the order and disposition or reputed ownership of the husband," it was dealing with cases in which a man and his wife are living together on premises where the husband is carrying on business. I find it difficult to think of any case in which husband and wife are living together in a house, where no business is carried on, in which it could properly be said that the husband any more than the wife was the reputed owner of the property in the house. Sect. 10 is, I think, really intended to deal with such a case as where a man and his wife are living in an hotel, the husband carrying on the business of an hotel keeper; he is known to be the proprietor of the business, and one would naturally presume that the business being his he would be the owner of the furniture in the various rooms let to guests. If in such a case as that the husband made a gift bona fide but secretly to his wife of the furniture in the hotel his creditors would be protected by s. 10. Here there was no evidence to justify a finding that the judgment debtor had the order and disposition of this furniture, or that he was the reputed owner of it even if one treats the section as applying to cases in which no business is carried on. There was nothing in this case to create the impression in the minds of those who knew anything of it that the judgment debtor rather than his wife was the owner of the furniture. That being so, this point fails also, and the appeal must be dismissed.

SANKEY J. stated the facts and continued: The first point made on behalf of the execution creditors is that the furniture in question was in the apparent possession of the husband, the judgment debtor, that the deed of gift of May 4, 1914, was a bill of sale which ought to have been but was not registered, and therefore that the furniture is not protected

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from seizure. Upon this point the real question is whether the furniture was in the apparent possession of the husband. As to this I think the case is concluded against the execution creditors by *Ramsay* v. *Margrett*. (1) There Lord Esher M.R. said: "When she"—that is, the wife—"bought these goods from her husband and paid him the price, they became her separate property. The goods were in the house in which the husband and the wife were living together, and in that state of things you could not say which of them had the actual possession of the goods." In the present case the execution creditors have not shown that this furniture was in the apparent possession of the husband; they have merely proved a state of facts which may show either that it was in the apparent possession of the husband or was in the apparent possession of the wife. That would be sufficient to dispose of the point, but counsel for the claimant is, I think, right in saying that he can put his case higher by relying upon what Lord Esher M.R. said in *Ramsay* v. *Margrett* (1) in the sentences immediately following those I have read. He said: "What is the rule of law as to possession in such a case? When the possession is doubtful it is attached by law to the title. Therefore, under such circumstances, the law considers the goods to be in the possession of the wife, who has the legal title to them." In this case the wife had the legal title to the furniture by reason of the deed of gift of May 4, 1914. Without that deed it might be difficult to say in whose possession this furniture was, but when the fact is added that the wife had the title to it, the possession in law is in her. That disposes of the first point.

The second point taken by counsel for the execution creditors turns upon the meaning of the latter part of s. 10 of the Married Women's Property Act, 1882. It is impossible to say that it has been proved that this furniture was in the order and disposition or reputed ownership of the husband. It may be—I express no opinion upon it—that all that has been proved is that the furniture was in the order and disposition or reputed ownership either of the husband or of the

(1) [1894] 2 Q. B. 18, 25.

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wife, but I think it is desirable to give a decision upon s. 10, which is directly involved, and upon which, so far as we can learn, there has been no decision. I desire to add nothing to what Lush J. has said on the doctrine of reputed ownership. I think it is probably right to say that the furniture settled on the wife was not in the reputed ownership of the husband, but giving the best interpretation I can to s. 10, I think its correct meaning is this: where a husband and wife are living together, goods can only be in the order and disposition or reputed ownership of the husband when he has acquired by something more than mere possession the reputation of being the owner, as, for example, where the husband and wife are living together in an hotel where he carries on the business of hotel keeper; but even in such a case it may be that the doctrine does not apply to the goods in the private as distinguished from the public rooms. In my view it must ultimately turn upon a question of fact. In this case I think the Master was right in the conclusion he arrived at. The appeal must therefore be dismissed.

Appeal dismissed.

Solicitors for execution creditors: *Reid Sharman & Co.*
Solicitor for claimant: *Arthur Sugden.*

J. S. H.

1921
June 2.

NATIONAL CASH REGISTER COMPANY, LIMITED *v.* STANLEY.

Contract—Hire-purchase—Breach—Hirer's Refusal to Accept—Remedy.

A hire-purchase agreement provided that in consideration of the plaintiffs agreeing to deliver a cash register to the defendant he would rent it for ten months certain and would pay by way of rent for the use and hire 8*l.* per month in advance with an option to purchase on payment of a fixed sum within one month after payment of all the rent for the agreed period of hiring. The defendant in breach of his contract refused to accept delivery of the register. The plaintiffs issued a default summons in the county court for rent accrued due up to the date of the summons:—

Held, that no actual debt had been incurred and that the action was not maintainable, the plaintiffs' remedy being in damages only.

Wright v. *Melville* (1828) 3 Car. & P. 542 distinguished.

APPEAL from Bloomsbury County Court.

The plaintiffs were the manufacturers and proprietors of an automatic cash register known as the "National Cash Register," which they sold and let on hire to traders for business purposes. On August 23, 1920, the defendant, who was a licensed victualler carrying on business at the Selhurst Arms, South Norwood, S.E., signed a printed form of order for one of the registers. The order was headed "Hiring agreement with option to purchase," and was as follows: "To the National Cash Register Co., Ld., chief office, 225 Tottenham Court Road, London, W. Please deliver to me on hire, consigned carriage paid to my place of business, 38 Selhurst Road, S. Norwood, S.E., as soon as possible, one of your no. 348 D. D. S. H. Registers L. V. business. And in consideration of your agreeing to deliver the said register I (hereinafter called the hirer) agree to rent the same for ten months certain and to pay by way of rent for the use and hire of the register, for the first one month the sum of 8*l.* per month and 8*l.* per month subsequently in advance, the first payment to be made herewith. . . . . At any time within one month after payment of all the rent for the whole of the agreed period of hiring, the hirer may purchase the register by paying to you an additional sum of 8*l.* Until such purchase and payment the register to remain the

property of the National Cash Register Co., Ld." Provisions then followed by which the hirer agreed to keep the register in good condition and to insure against damage by fire, and, in case default was made in payment of rent for fourteen days after the due date, to deliver up the register to the company on demand, such return on demand or retaking to determine the hiring but not to affect the plaintiffs' " right to rent previously accrued due."

The defendant signed this document in the presence of the plaintiffs' agent and handed to him 2*l.* in part payment of the first month's rent. On August 26, 1920, the plaintiffs wrote accepting this order and at the same time tendered a machine to the defendant at the address given, but at his request they agreed to postpone delivery for a time. On September 6 the defendant wrote to the plaintiffs stating that he had bought a machine elsewhere and asking them to cancel the order. This the plaintiffs refused to do, and on October 5, 1920, they again tendered a machine, but the defendant refused to accept delivery. The plaintiffs from that time regarded this machine as appropriated to the contract and refrained from letting it out to any other customer. They applied to the defendant from time to time for rent due under the contract, but the defendant refused or neglected to pay. On February 14, 1921, they issued a default summons to the defendant in the Bloomsbury County Court, claiming 30*l.*, which was the amount then due for four months' hire of the register under the agreement of August 23, 1920, after deducting 2*l.* paid by the defendant on account.

The deputy county court judge found that there had been a breach of contract by the defendant; but he held that as the payments under the agreement were expressed to be " by way of rent for the use and hire of the register " the promise was not an absolute one to make monthly payments of 8*l.* independently of delivery use or hire and that the plaintiffs' remedy was in damages only: *British Automatic Co.* v. *Haynes.* (1) His judgment concluded: " As the plaintiffs have chosen to proceed by default summons they cannot

(1) [1921] 1 K. B. 377.

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obtain damages in this action, but there is no reason why they should not do so in a fresh action properly constituted. I think the proper course is to enter a non-suit."

The plaintiffs appealed.

Hollis Walker K.C. and *G. H. Head* for the plaintiffs. Upon the defendant's refusal to take delivery, the plaintiffs were entitled either to hold him to his contract, or to accept his refusal and sue for damages. They adopted the first course and can claim rent for hire as it accrues due: *Wright* v. *Melville.* (1)

[LUSH J. If a landlady lets furnished rooms for six weeks, and the tenant refuses to occupy or pay for them, can she recover the full rent?]

Yes, if she keeps the rooms open; if she lets to another tenant she has accepted cancellation and her action is for damages only and not for rent.

F. Hinde (*Latey* with him) for the defendant. The plaintiffs are in effect suing for specific performance and such an application must fail. Their only remedy is an action for damages for breach. It was not the intention of the parties under the agreement that if the defendant did not have the machine, he should pay hire. Had he been compelled to return it, "rent previously accrued due" would alone have been recoverable, not future rent. Apart from the terms of the document, the register was never delivered, and was therefore never appropriated to the contract. The plaintiffs' duty was to let the register to another customer and so, if possible, to minimise the damage: *British Automatic Co.* v. *Haynes.* (2) Their remedy lies in damages only, the measure of damages being the loss sustained owing to the breach.

As regards *Wright* v. *Melville* (1) the letting there was only for five weeks; and further, actual delivery of the article hired had been effected.

Hollis Walker K.C. in reply. In *Michael* v. *Hart & Co.* (3)

(1) 3 Car. & P. 542. (2) [1921] 1 K. B. 377.
(3) [1902] 1 K. B. 482, 490.

Collins M.R. speaking of the effect of an anticipatory breach of contract going to the whole consideration says: "It only has the effect of giving the other party to the contract an option to treat the repudiation of the contract as a definitive breach of it, and thereupon to treat the contract as rescinded, except for the purpose of his bringing an action for breach of it. It gives him the right to do that; but, on the other hand, he may refuse to treat the contract as rescinded, and hold the party repudiating the contract to his obligation when the time fixed for performance arrives."

[LUSH J. If a servant is hired for six months certain, and before his employment begins the master repudiates, can the servant sue for six months' wages under the agreement ?]

Yes, but he would probably recover more, at the hands of a jury by suing for damages, and would take that course.

[SANKEY J. referred to *Down* v. *Pinto*. (1)]

LUSH J. I am of opinion that the deputy county court judge was right and that his judgment should be affirmed. The plaintiffs say that when the contract was signed the defendant became indebted to them in the sum of 80*l*., the whole of the ten monthly instalments of 8*l*. each. Unless an actual debt was incurred, the action is not maintainable, and it seems clear to me that the defendant did not, by signing the agreement, become indebted in the sum of 80*l*. The agreement says: "In consideration of your agreeing to deliver the said register, I . . . . agree to rent the same for ten months certain, and to pay by way of rent for the use and hire of the register the sum of 8*l*. per month." It is to be observed that payment is to be made "for the use and hire." The defendant refused to take the register. He broke the contract and is undoubtedly liable in damages to the plaintiffs, but this is not a liquidated debt of 80*l*. The plaintiffs contend that once the contract was signed, they can claim specific performance—or they say that, even if the defendant did not take delivery of the register, they are to be put in the same position as if he had done so. In

(1) (1854) 9 Ex. 327.

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my view the effect of not carrying out the contract is to entitle the plaintiffs to damages for the breach, not to entitle them to be put in the same position as if the contract had been performed. No doubt there are cases in which payment of the agreed sum may be claimed, as for instance, where furnished lodgings are let to a tenant for a fixed period; but the distinction there is that an interest is vested by virtue of the agreement in the person who agrees to pay rent. If the plaintiffs' contention were right, then in every case of hire the hirer would be obliged to pay the whole of the rent agreed. A servant who is hired for six months certain cannot treat his employer as indebted to him for the whole of his wages. He may recover that amount, but he will do so by way of damages and not because he is so indebted under his agreement.

In *Wright* v. *Melville* (1), which bears some resemblance to the present case, the defendant had selected the article which was hired; it had been sent to him and he had used it. Here on the contrary the register had not been selected by the defendant nor had he ever used it; no specific register had been appropriated to the contract. The plaintiffs' only remedy is an action for damages for the refusal by the defendant to carry out the contract.

SANKEY J. The plaintiffs' real cause of action is not for rent for "use and hire" of the register, but for damages arising from the defendant's breach of the agreement. If the defendant had had the use of the register for any period, then as in *Wright* v. *Melville* (1) the plaintiffs would have been entitled to recover. But he had not, and it seems to me that this distinguishes the present case from *Wright* v. *Melville* (1) and that the deputy county court judge was right in his decision.

Appeal dismissed.

Solicitors for plaintiffs: *Beardall & Co.*
Solicitor for defendant: *C. M. Benwell.*

(1) 3 Car. & P. 542.

F. P. F.

HARRISON *v.* HOLLAND AND HANNEN AND CUBITTS, LIMITED.

1921
June 22.

[1921. H. 1910.]

Vendor and Purchaser—Part Payment of purchase Price—Default by Purchaser —Acceptance by Vendor of Repudiation—Vendor's Claim to retain part Payment as Security for Loss on Resale.

By a contract for the sale of real property it was provided that the purchasers should pay 50,000*l.* as a deposit and a further sum of 100,000*l.* on account of the purchase price. The contract also provided that "if the purchasers fail to comply with the stipulations hereof their deposit of 50,000*l.*, but not the said sum of 100,000*l.*, shall be forfeited and the vendors may resell the property in such manner as they think fit and any deficiency arising on the resale and all expenses attending the same or any attempted resale shall be paid by the purchasers to the vendors as liquidated damages." The purchasers paid the two sums mentioned but made default in completion, whereupon the vendors forfeited the deposit of 50,000*l.* and endeavoured to resell the property. Thereafter the purchasers assigned to the plaintiff their right to the 100,000*l.*, and he now sued to recover the same, but was met by a claim on the part of the vendors to retain the amount for a reasonable time as security for any loss they might sustain on the resale of the property:—

Held, that the parties treated the 100,000*l.* simply as a payment on account of the purchase price, and that the vendors were not entitled, on the cancellation of the contract, to retain that sum as security for any loss they might sustain on a resale.

ACTION tried by Lush J. as a short cause.

The plaintiff claimed to recover the sum of 100,000*l.* as money had and received by the defendants to the use of one Barley and one Sibthorp, which, by deed dated March 2, 1921, was absolutely assigned by Barley and Sibthorp to the plaintiff, of which assignment the plaintiff duly gave notice in writing.

By a contract in writing dated March 29, 1920, the defendants agreed to sell Devonshire House and the premises connected therewith to Barley and Sibthorp for 1,050,000*l.* Clause 3 of that contract after stating the purchase price continued thus: "the purchasers having on the signing hereof paid to the vendors the sum of 50,000*l.* as a deposit and in part payment of the said purchase money, shall pay the sum of 100,000*l.* further on account of the purchase price

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within fourteen days from the date hereof and shall pay the balance of the purchase money" within a certain time. Clause 20 provided that "if the purchasers fail to comply with the stipulations hereof their deposit of 50,000*l.*, but not the said sum of 100,000*l.*, shall be forfeited and the vendors may resell the property in such manner as they think fit and any deficiency arising on the resale and all expenses attending the same or any attempted resale shall be paid by the purchasers to the vendors as liquidated damages." The purchasers did not complete at the stipulated time, and ultimately, after some extensions granted by the vendors, the vendors' solicitors on December 22, 1920, wrote to Barley's solicitors intimating that as default had been made in completing the purchase, the vendors "have now forfeited your client's deposit of 50,000*l.* and are exercising the power of resale in accordance with clause 20, and your client has now no longer any right to call upon ours to complete the purchase contemplated by the contract of March 29, 1920." On the same date the vendors gave an option to other persons to deal with the property. No sale had so far been effected however. On March 2, 1921, Barley and Sibthorp assigned to the plaintiff their right to recover the sum of 100,000*l.*, and notice thereof was duly given to the defendants. On May 3, 1921, the writ in this action was issued claiming to recover the 100,000*l.*, the plaintiff alleging that the consideration for its payment to the defendants by Barley and Sibthorp had wholly failed. The defendants set up their right to resell the property and claimed to be entitled to utilise the 100,000*l.* in satisfaction or part satisfaction of the difference between the price realized on a resale and the contract price plus the expenses they had been put to.

On the evidence Lush J. came to the conclusion that if the defendants were in law entitled to retain the 100,000*l.* for a reasonable time to enable them to dispose of the property, a reasonable time had not elapsed.

Hogg K.C. and *Sir Albion Richardson* for the plaintiff. The defendants are not entitled to retain the 100,000*l.*, which

was declared by clause 20 not to be forfeitable, as security for any loss they may sustain on a resale.

[They cited *Ockenden* v. *Henly*. (1)]

Sir John Simon K.C. and *C. A. Bennett* for the defendants. Where a contract for sale goes off by default of the purchaser the vendor is entitled to retain the deposit: *Ex parte Barrell* (2); *Howe* v. *Smith*. (3) On the principle of those cases and of *Hart* v. *Porthgain Harbour Co.* (4) the defendants are entitled to retain the 100,000*l.* which was paid as security for the due performance of the contract, in case on a resale the price realized is less than that stipulated in the contract with Barley and Sibthorp. In this way effect is given to the intention of clause 20. The bargain went off through the default of those persons, and they cannot be allowed to invoke the aid of the Court in their character of wrongdoers.

[They also cited *Palmer* v. *Temple*. (5)]

Hogg K.C. in reply. The vendors having treated the contract as at an end are not entitled to retain anything but the sum paid expressly as a deposit. *Palmer* v. *Temple* (5) is an authority for this proposition. The law on this subject is clearly stated in The Law of Vendor and Purchaser, by T. Cyprian Williams, 2nd ed., vol. ii., p. 1054, where it is said that a party rescinding the contract for the other's breach "shall not enjoy the advantage of rescission without yielding up every benefit he has taken by the previous part-performance of the contract. But an exception to this rule occurs with regard to a deposit."

LUSH J. stated the facts set out above and continued: The question I have to decide is whether the defendants' contention that they are entitled to retain the 100,000*l.* as security for any loss they may ultimately suffer on the resale of the property, is well founded.

At one time it was thought that unless money which had been expressly paid by way of deposit was stated to be

(1) (1858) E. B. & E. 485.
(2) (1875) L. R. 10 Ch. 512.
(3) (1884) 27 Ch. D. 89.
(4) [1903] 1 Ch. 690, 695–6.
(5) (1839) 9 Ad. & E. 508.

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Lush J.

forfeitable in case of default, it was recoverable by the purchaser if he made default and the vendor accepted the repudiation and rescinded the contract. In *Palmer* v. *Temple* (1) this question was considered. From the report of that case it appears that two actions were brought. At the date of the writ in the first action there had been a default by the purchaser but no acceptance of his repudiation by the vendor. The fact that the purchaser made default did not of itself rescind the contract. It was held that the purchaser could not recover in that action because it was premature, the vendor not having then treated the contract as at an end. But, later, the vendor accepted the purchaser's repudiation, and thereupon the purchaser brought a second action claiming the deposit and it was held that he was entitled to recover. The view of the Court was that inasmuch as the deposit was not made forfeitable in case of default the vendor had no answer to the plaintiff's claim for its return, the contract having been put an end to. The vendor could not retain the amount as security for any loss. In *Ex parte Barrell* (2) and *Howe* v. *Smith* (3) it was finally decided that a deposit if paid eo nomine as a deposit is to be treated, not as a security for any loss the vendor may suffer, but as a guarantee for the due performance of the contract, and therefore if the purchaser makes default the vendor can forfeit the deposit although the contract may not specifically so stipulate. In the present case the parties have expressly provided, although that was not necessary, that the deposit of 50,000*l.* should be forfeited if the purchasers made default, but as to the 100,000*l.* they have expressly provided that it shall not be forfeited. The 100,000*l.* is not called a deposit; it is expressly stated to be in part payment of the purchase money, and so it is not money paid as a guarantee for the due performance of the contract. It is therefore not forfeitable. But the question remains, can the vendors claim to retain it until the lapse of a reasonable time, so that, if within that time they resell

(1) (1839) 9 Ad. & E. 508. (2) (1875) L. R. 10 Ch. 512.
(3) (1884) 27 Ch. D. 89.

the property at a loss which is not capable of being made good out of the deposit of 50,000*l.*, they can satisfy their loss out of so much of the 100,000*l.* as with the 50,000*l.* will make up the whole loss suffered ? In my opinion the vendors have no such right. I am unable to see how such a right can be extracted from clause 20, or, apart from that clause, how it can be supported on any principle of law. Sir John Simon relied upon clause 20, but that clause tends rather to support the plaintiff's view. The parties have not provided by the clause that the 100,000*l.* shall be retained by the vendors as security for any loss they may sustain, although the clause provides that on the purchasers' failure to comply with the stipulations of the contract "the vendors may resell the property . . . . and any deficiency arising on the resale and all expenses attending the same or any attempted resale shall be paid by the purchasers to the vendors as liquidated damages." If the parties had intended that the vendors should be entitled to retain the 100,000*l.* until they resold, as a security for their loss, they would have said so. The parties have treated the 100,000*l.* simply as a payment on account of the purchase price, in which case, on the contract being cancelled, it is to be returned to the purchasers. The 50,000*l.* is to be treated as the only sum to stand in any way as security for the due performance of the contract. Upon the construction of clause 20 and upon a consideration of the principles of law I have stated the plaintiff succeeds and is entitled to judgment for 100,000*l.*

Judgment for plaintiff.

Solicitors for plaintiff : *Wadeson & Malleson.*
Solicitors for defendants : *Leighton & Savory.*

J. S. H.

1921
May 12;
June 9.

COLLEY *v.* OVERSEAS EXPORTERS.

Sale of Goods—F.O.B. Contract—Failure of Buyer to provide Ship—Prevention of Delivery—Action for Price.

Unascertained goods were sold f.o.b. The seller sent them to the port of shipment, but, owing to the failure of the buyer to name an effective ship, he was prevented from putting them on board:—

Held, that this default of the buyer did not have the effect of placing the seller in the same position as if he had put the goods on board, and that in the absence of an agreement that the price should be payable on a day certain irrespective of delivery he could not sue for the price.

Mackay v. *Dick* (1881) 6 App. Cas. 251 distinguished.

TRIAL of action before McCardie J. under Order XIV.

The plaintiff, a leather merchant at Sheffield, sold to the defendants on December 17, 1920, a quantity of leather belting "F.O.B. Liverpool." The goods were unascertained at the date of the sale. There was no special agreement making the price payable on a day certain irrespective of delivery. The defendants instructed the plaintiff to consign the goods to the Alexandra Dock Station at Liverpool, c/o Daniel Maccabe, Ld., shipping agents, for shipment on board steamship *Kenuta*. The plaintiff duly dispatched the goods to the station named on February 3, 1921, but unfortunately the *Kenuta* was withdrawn from service by her owners, and four other vessels which were in turn substituted by the defendants for the *Kenuta* were all prevented from one cause or another from taking the plaintiff's belting on board, with the result that after the goods had been lying at the dock station for more than two months they were still not shipped. In those circumstances the plaintiff brought this action on a specially indorsed writ for the price.

R. A. Willes for the plaintiff. As the defendants failed to name an effective ship they relieved the plaintiff from the performance of his obligation to put the goods on board as a condition precedent to the passing of the property and consequently to his right to sue for the price. The defendants having by their default prevented the plaintiff from

performing that condition precedent must be regarded as having waived the performance of it. The principle applicable is that which is stated in the headnote to *Mackay* v. *Dick* (1): "If, in the case of a contract of sale and delivery, which makes acceptance of the thing sold and payment of the price conditional on a certain thing being done by the seller, the buyer prevents the possibility of the seller fulfilling the condition, the contract is to be taken as satisfied." There the action was brought for the price of a digging machine, the price being payable conditionally on its satisfying a certain test. The buyer having wrongfully prevented the application of the test the seller was held entitled to sue for the price, notwithstanding that the test had not been satisfied. The seller there was treated as if the test had been satisfied. So here the plaintiff must be treated as if the goods had been put on board. The buyer's conduct precludes him from alleging that the property has not passed.

J. G. Joseph for the defendants. On the defendants' failure to name an effective ship the plaintiff might have put an end to the contract and sued for damages; but he cannot sue for the price until he performs the condition of putting the goods on board. In *Mackay* v. *Dick* (1) the contract was for the sale, not of unascertained goods as here, but of a specific article, and the property passed immediately upon delivery, subject to the provision as to the return of the machine in the event of its failing to pass the stipulated test. Consequently as the property there had passed the seller was held entitled to sue for the price. But here the property has not passed, and it is contrary to all principle in such a case to allow the seller to sue for the price.

Cur. adv. vult.

June 9. McCARDIE J. read the following judgment: This action is brought upon a writ specially indorsed within Order XIV. to recover the sum of 985*l.* 17*s.* 4*d.* alleged to be

(1) 6 App. Cas. 251.

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due from the defendants to the plaintiff as the price of goods. The only question is whether that liquidated sum is due. No question arises as yet as to damages against the defendants. The case raises a point of legal interest and practical utility as to the circumstances under which the purchase price of goods can be sued for. The facts are not in dispute. They can be briefly stated. The plaintiff is a leather merchant at Sheffield. The defendants are merchants at Sheffield. On December 17, 1920, the plaintiff sold to the defendants a quantity of leather belting of stated sizes and qualities and at certain prices "F.O.B. Liverpool." The goods were not specific within the definition clause (s. 62) of the Sale of Goods Act, 1893. They were unascertained at the date of the bargain. On January 26, 1921, the defendants sent shipping instructions to the plaintiff. These directed that the goods should be packed for export and marked as ordered, and then said: "S/S. *Kenuta*. Closing despatch 2/2/21 and 5/2/21. Consign to Alexandra Dock Station, Liverpool, c/o Daniel Maccabe, Ltd., 17 Brunswick St., Liverpool, advising them of despatch." On February 3 the plaintiff wrote to Maccabe, Ld., who are shipping agents at Liverpool: "We have to day despatched by the Great Central Railway Co. (Alexandra Dock Station) to S/S. *Kenuta* to the order of Overseas Exporters Ltd. of Sheffield 7 cases of leather belting." The goods left Sheffield and reached their destination in Liverpool to be dealt with by Maccabe, Ld., in order to carry out the plaintiff's obligation to put them on board. A series of misfortunes then occurred. The *Kenuta* was withdrawn from service by her owners, who then proposed to substitute another ship. This second ship was however inadequate for the intended voyage. Then a third vessel was put forward as a substitute, but, an accident having occurred to a fourth vessel of the same owners, the third ship had to be used to replace that damaged vessel. So a further ship was put forward—namely, *The Sorata*, which was then at Glasgow. She however could not reach Liverpool because of a strike. The result was that on April 14, 1921, the day on which the writ was issued,

the goods were still unshipped and the plaintiff was still unpaid. Prior to April 13 Daniel Maccabe, Ld., sent a note of their charges, amounting to 1*l.* 4*s.*, to the plaintiff, and on April 13 he gave them a cheque for that sum. He of course was responsible for these charges, as the cost of getting the goods aboard fell on him under the contract. Such are the facts. The defendants committed no deliberate breach of contract; they suffered a series of misfortunes. They failed however to name an effective ship. The plaintiff on his part did all he could to carry out his obligations. Under these circumstances the plaintiff seeks to recover the price of the goods in question. The able argument of Mr. Willes for the plaintiff rested on two well-known passages in the judgment of Lord Blackburn in *Mackay* v. *Dick.* (1) The first passage is this: "I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect." The second passage is this: "It would follow in point of law that the defender having had the machine delivered to him, was by his contract to keep it, unless on a fair test according to the contract it failed to do the stipulated quantity of work, in which case he would be entitled to call on the pursuers to remove it. And *by his own default* he can now never be in a position to call upon the pursuers to take back the machine, on the ground that the test had not been satisfied, he must, as far as regards that, keep, and consequently pay for it." I will consider later on the facts in *Mackay* v. *Dick.* (1) The contention of Mr. Willes before me was that inasmuch as the defendants' own fault had here prevented the goods from being put on board they were disabled from saying that the price, which would have been payable if and when the goods had actually been put on board, was not now due to the plaintiff. This is a novel

(1) 6 App. Cas. 251, 263, 264.

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and interesting submission. An action for the price of goods is, of course, essentially an action for a liquidated sum. It involves special and technical elements. By special bargain the price of goods may be payable before delivery or before the property has passed from vendor to buyer: see *Pordage* v. *Cole* (1); Leake on Contracts, 6th ed., pp. 467–8; *Workman, Clark & Co.* v. *Lloyd Brazileño* (2); and s. 49 of the Sale of Goods Act, 1893. In ordinary cases and unless otherwise agreed delivery of the goods and payment of the price are concurrent conditions: see s. 28 of the Sale of Goods Act, 1893. Now the full meaning of the word "price" is not actually defined by the Sale of Goods Act, except perhaps in s. 1, which says: "A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price." The circumstances however under which a claim to the price may be made (as distinguished from a claim of damages for breach of contract) are indicated in s. 49 of that Act. Sect. 49 provides, sub-s. 1: "Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods." Sub-s. 2: "Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract." Here sub-s. 2 of s. 49 does not apply, as it apparently did in *Workman, Clark & Co.* v. *Lloyd Brazileño* (2), where the price was payable by stated instalments on stated dates. The parties before me here made no special agreement as to the payment of the price. Nor can it be said that sub-s. 1 of s. 49 applies here, for the property in the goods has not in fact and law passed to the buyer. Several rules for the passing of property in sale of goods contracts are indicated

(1) (1669) 1 Wms. Saund. 320. (2) [1908] 1 K. B. 968.

in ss. 16, 17, 18, and also in s. 32. The Act does not deal specifically with f.o.b. or c.i.f. contracts. Judicially settled rules exist however with respect to them. I need only deal with f.o.b. contracts. The presumed intention (see s. 18 of the Act) of the parties has been settled. It seems clear that in the absence of special agreement the property and risk in goods does not in the case of an f.o.b. contract pass from the seller to the buyer till the goods are actually put on board: see *Browne* v. *Hare* (1); *Inglis* v. *Stock* (2); *Wimble* v. *Rosenberg* (3); Benjamin on Sale, 6th ed., p. 785, where several useful cases are collected. Unless therefore the principle involved in the words of Lord Blackburn in the second passage cited from *Mackay* v. *Dick* (4) applies here the plaintiff will fail. Does the principle go to the extent submitted by Mr. Willes? It is well to consider *Mackay* v. *Dick*. (4) The headnote says: "If, in the case of a contract of sale and delivery, which makes acceptance of the thing sold and payment of the price conditional on a certain thing being done by the seller, the buyer prevents the possibility of the seller fulfilling the condition, the contract is to be taken as satisfied." If this headnote be given its full apparent effect then the principle it suggests would be most far reaching, and the results extraordinary. The facts in *Mackay* v. *Dick* (4) must be remembered. Concisely put they were these. By a contract in two letters the seller agreed to sell and deliver at the buyer's works a digging machine. The price of 1125*l*. was payable after the machine had satisfactorily performed certain tests. If it failed to perform them the buyer was to remove the machine. The machine was actually delivered into the buyer's possession. Owing however to the buyer's own default it did not perform the tests. He refused to pay the price, and the seller thereupon brought his action for the 1125*l*. The plaintiff succeeded on the principle stated by Lord Blackburn. It is to be clearly noted that a specific machine was fully delivered by the seller to the buyer.

(1) (1859) 4 H. & N. 822.
(2) (1885) 10 App. Cas. 263.
(3) [1913] 3 K. B. 743, 747.
(4) 6 App. Cas. 251.

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Apparently the property in the machine actually passed to the buyer. It is true that *Mackay* v. *Dick* (1) fell to be decided by Scotch law. The decision was given by the House of Lords in 1881, twelve years before the Sale of Goods Act, 1893. Scotch law then rested on the civil law and not on English common law, and the transfer of property in goods therefore possessed special features derived from Roman jurisprudence: see Erskine's Principles of the Law of Scotland, 19th ed., p. 322; Chalmers' Sale of Goods, 8th ed., p. 9; Brown on Sale of Goods, 2nd ed., p. 114. It seems clear however that under Scotch law the property in the digging machine had passed to the buyer on delivery: see Erskine (sup.), p. 322. Hence I think that the sale and delivery of the machine must in *Mackay* v. *Dick* (1) be deemed to have been complete, and payment of the price was therefore subject only to the "resolutive condition" imposed by the clause as to the test: see Chalmers' Sale of Goods, 8th ed., pp. 6, 7, and the cases there cited as to resolutive conditions. Default by the buyer as to the test was proved, and thus the seller got his judgment for the price. The actual decision in *Mackay* v. *Dick* (1) does not therefore aid the plaintiff here. The real question is as to the extent to which the principle indicated by Lord Blackburn in the second passage I have quoted operates to make a price payable which, apart from that principle, would not be payable. Although, as I have said, *Mackay* v. *Dick* (1) turned on Scotch law yet I think that that principle is equally well settled in English law. It has frequently been asserted in well-known text books based on English law: see Addison on Contracts, 11th ed., p. 624; Leake on Contracts, 6th ed., p. 479. In Chitty on Contracts, 17th ed., p. 833, the matter is put very broadly thus: "If on a contract of sale payment is conditional on a certain thing being done by the seller, and the buyer prevents the possibility of the condition being fulfilled, the seller may recover the price." So too in Benjamin on Sale, 6th ed., p. 641, there is this passage: "As long ago as 1787

(1) 6 App. Cas. 251.

Ashhurst J. in delivering the opinion of the King's Bench in *Hotham* v. *East India Co.* (1) said that it was evident from common sense that if the performance of a condition precedent by the plaintiff had been rendered impossible by the neglect or default of the defendant 'it is equal to performance.'" The principle moreover has been frequently applied in the Courts and is illustrated by *Braithwaite* v. *Foreign Hardwood Co.* (2) Nowhere is that principle more luminously dealt with or the English decisions more aptly cited than in Pollock on Contracts, 9th ed., 294–6. It is a corollary and amplification of the rule asserted in the first passage cited by me from Lord Blackburn's judgment. This rule is recognized by the text books as embodied in English law, and has been widely applied by high tribunals as of obvious justice and convenience: see, e.g., *Sprague* v. *Booth* (3); *Kleinert* v. *Abosso Gold Mining Co.* (4) I respectfully followed those authorities in *Harrison* v. *Walker.* (5) Now in deciding whether the argument of Mr. Willes in this case be sound, and in determining the extent to which the principle stated in the second cited passage from Lord Blackburn may be applied, it is necessary to remember the law which existed before the Act of 1893 was passed. In former days an action for the price of goods would only lie upon one or other of two counts. First, upon the indebitatus count for goods sold and delivered, which was pleaded as follows: "Money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant": Bullen and Leake, Precedents of Pleading, 3rd ed., p. 38. This count would not lie before delivery: *Boulter* v. *Arnott.* (6) The count was applicable where upon a sale of goods the property had passed and the goods had been delivered to the purchaser and the price was payable at the time of action brought. Secondly, upon the indebitatus count for goods bargained and sold, which was pleaded as follows: "Money payable by the defendant

(1) (1787) 1 T. R. 638, 645.
(2) [1905] 2 K. B. 543.
(3) [1909] A. C. 576, 580.
(4) (1913) 58 Sol. J. 45.
(5) [1919] 2 K. B. 453.
(6) (1833) 1 Cr. & M. 333.

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to the plaintiff for goods bargained and sold by the plaintiff to the defendant": Bullen and Leake, p. 39. This count was applicable where upon a sale of goods the property had passed to the purchaser and the contract had been completed in all respects except delivery, and the delivery was not a part of the consideration for the price or a condition precedent to its payment. If the property had not passed the count would not lie: *Atkinson* v. *Bell.* (1) In my view the law as to the circumstances under which an action will lie for the price of goods has not been changed by the Sale of Goods Act, 1893. That enactment appears to crystallise and confirm the old law: Chalmers' Sale of Goods, 8th ed., p. 112. By the definition clause of that Act, s. 62, "sale" is to include a bargain and sale as well as a sale and delivery. A sale or, as it is called for distinction, an executed contract of sale is a contract plus a conveyance: Chalmers (sup.), p. 8. The existing condition of the law is put in Benjamin on Sale, 6th ed., p. 946, where it is rightly stated that the old principles "are by implication preserved by s. 49 of the code." And the learned editor adds: "Where the property has not passed, the seller's claim must, as a general rule, be special for damages for non-acceptance." An exception to the general rule is to be found in the cases provided for by s. 49, sub-s. 2, of the code. In my opinion (subject to what I say hereafter as to estoppel) no action will lie for the price of goods until the property has passed, save only in the special cases provided for by s. 49, sub-s. 2. This seems plain both on the code and on common law principle. I have searched in vain for authority to the contrary. A clear distinction exists between cases where the default of the buyer has occurred after the property has passed and cases where that default has been before the property has passed. To the former cases *Mackay* v. *Dick* (2) may be applied on appropriate facts. To the latter cases *Mackay* v. *Dick* (2) does not apply so as to enable the ~~buyer~~ seller to recover the price as distinguished from damages for breach of contract. To hold that *Mackay* v. *Dick* (2)

(1) (1828) 8 B. & C. 277.

(2) 6 App. Cas. 251.

applies where the property has not passed would lead to extraordinary results. Here the substantial allegation against the defendants is that their default prevented the plaintiff from passing the property and so entitling him to the price. Just the same default however would, in substance, have been committed if the defendants had repudiated the contract before the goods had been sent from Sheffield. So too every buyer who refuses to take delivery of unascertained goods and thereby prevents the transference of property in them from the seller commits a similar default. If the ingenious contention of Mr. Willes were correct it would be difficult to imagine a case of sale of goods, even though unascertained, to which *Mackay* v. *Dick* (1) would not apply. The pages of Benjamin on Sale will afford many appropriate illustrations of this. An interesting decision on the matter is that of Atkin J. in *Stein Forbes* v. *County Tailoring Co.* (2) There the purchasers of goods under a c.i.f. contract (payment to be net cash against documents on arrival of steamer) refused to take up the documents when ready. Atkin J. held that s. 49, sub-s. 2, of the Code did not apply, and that as the property in the goods had not passed the sellers could recover damages only and not the price. The rule which applies to sales of goods seems also to apply to sales of land. If the vendor has conveyed the property in land to the purchaser he can recover the price. If not he can get damages only : Leake on Contracts, 6th ed., p. 469 ; *Laird* v. *Pim* (3) ; *East London Union* v. *Metropolitan Ry. Co.* (4) Towards the close of his argument Mr. Willes submitted a further point—namely, that the defendants were estopped from denying that the property had passed to them. Estoppel is a vague word. It is often used to support a submission not capable of precise juristic formulation. The only estoppel which can be suggested is estoppel by conduct. A good illustration on the point is *Pickard* v. *Sears*. (5) I need not state the facts of that case,

(1) 6 App. Cas. 251.
(2) (1916) 115 L. T. 215.
(3) (1841) 7 M. & W. 474.
(4) (1869) L. R. 4 Ex. 309.
(5) (1837) 6 Ad. & E. 469.

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which has been frequently applied. The main rule was clearly put in *Carr* v. *London and North Western Ry. Co.* (1) as follows: "If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented." This is a useful rule. It is quite distinct from what is called "waiver" in Benjamin on Sale, 6th ed., p. 643. If therefore the defendants in this case represented to the plaintiffs facts showing that the property in the goods had passed to them, and if also the plaintiff had believed that representation and had acted upon it to his damage, then the defendants would, I conceive, be estopped from denying that the property had passed to them and that the price was therefore payable to the plaintiff: see *Knights* v. *Wiffen*. (2) I am satisfied that there is no estoppel on the facts and documents here before me. The defendants made no misrepresentation of fact. The plaintiff has not acted on any statement or relied on any misleading conduct of the defendants. He knew the circumstances as fully as the defendants knew them. None of the elements of estoppel are here present. It follows therefore for the reasons given that the plaintiff is not entitled to recover the price of the goods in question. If he desires to claim damages he must amend his writ. On the record at present before me he cannot ask for judgment.

Judgment for the defendants.

Solicitors for the plaintiff: *Ellis, Bickersteth & Co., for C. Barker, Sheffield.*

Solicitors for the defendants: *Ernest Salaman & Co.*

(1) (1875) L. R. 10 C. P. 307, 317. (2) (1870) L. R. 5 Q. B. 660.

J. F. C.

LLANGOLLEN PARISH COUNCIL AND OVERSEERS AND OTHERS *v.* DENBIGHSHIRE COUNTY COUNCIL.

1920
April 28.
1921
Feb. 8, 15.

[1919. D. 270.]

Education—Rate—Public Elementary School—Intermediate School used partly for elementary Purposes—Elementary Education Act, 1870 (33 *&* 34 *Vict. c.* 75), *ss.* 3, 7, 97—*Education Act,* 1902 (2 *Edw.* 7, *c.* 42), *s.* 18, *sub-s.* 1 (*c*).

A county council were the local education authority and also the governing body of an intermediate school erected under the Welsh Intermediate Education Act, 1889. Further accommodation being required for that school and there being no facilities for teaching subjects like laundry and cookery to girls, and wood carving and woodwork to boys, in eight schools, in four parishes adjacent to the place where the intermediate school was situated, the county council decided with the approval of the Board of Education to erect new buildings for the intermediate school to be used for both elementary and secondary school purposes. About 240 elementary pupils from the eight schools in the four parishes attended the school. The secondary pupils used the whole of the first floor, and the elementary pupils used part of the ground floor. Only the special subjects mentioned above were taught to the elementary pupils; the provisions of the Day School Code were never complied with in the building in question. The expense of erecting the building was met by a loan repayable by annual sums representing a sinking fund and interest. The county council sought to levy, under s. 18, sub-s. 1 (*c*), of the Education Act, 1902, a portion of that annual sum by means of a rate on the four parishes from which the elementary pupils came, as being the parishes served by the school:—

Held, that the school was not a public elementary school, and that therefore the county council were not entitled, under s. 18, sub-s. 1 (*c*), of the Act of 1902, to levy a rate on the four parishes as being capital expenditure or rent on account of the provision or improvement of a public elementary school, and that the four parishes were entitled to appropriate declarations and injunctions.

ACTION tried by Sankey J.

The plaintiffs were the Overseers of the parishes of Llangollen Urban, Llangollen Rural, Llantysilio and Chirk in the county of Denbigh, two ratepayers in the parish of Llangollen, and the Llangollen Rural Parish Council.

The defendants were the County Council of Denbighshire and as such were the local education authority under the Education Act, 1902.

1920

LLANGOLLEN PARISH COUNCIL v. DENBIGHSHIRE COUNTY COUNCIL.

The following statement of facts is taken from the judgment :—

"At Llangollen in Denbighshire there is a county school (hereinafter called the intermediate school) erected as a county intermediate school in 1897 under a scheme made in pursuance of the Welsh Intermediate Education Act, 1889. The land for the purpose of the said school was acquired by its governing body and the buildings erected by them.

"In 1904 the county council took over the duties and liabilities of the governing body of the intermediate school and the land and buildings became their property, the school still being managed by a board of governors hereinafter called the local governors.

"In 1907 the Central Welsh Board reported that further accommodation was required for the intermediate school and the question arose as to what buildings should be erected and how the money for their erection should be obtained. By this time the county council had become the local education authority. They therefore were in a manner acting in two capacities, being in the position of the old governing body of the intermediate school owning the land and buildings and being also the elementary education authority.

"The plaintiff parishes are situated in the neighbourhood of Llangollen, some only a short distance off as the crow flies, but as much as 12 miles by railway, owing to their situation in valleys separated by hills. Some of these parishes have non-provided schools, some have provided schools. None of them had proper facilities for carrying out the education of girls in subjects like laundry and cookery, or the boys in subjects like wood carving and woodwork. The expenses of teaching such subjects are paid out of the special subject grant under Part III. of the Education Act, 1902, and not out of the annual grant.

"In these circumstances the county council were desirous : (1.) That the intermediate school buildings should be extended. (2.) That provision should be made for teaching the above mentioned subjects to the elementary schools.

(3.) That these objects should be obtained as economically as possible. They came to the conclusion that it would be advantageous for all parties that the new buildings, which had to be erected for the purposes of the intermediate school, should be made available for the purposes of the local education authority, and that the boys and girls in the elementary schools in the plaintiff parishes, who had to be instructed in these various subjects, should have the use of some of the rooms of the new intermediate school buildings where they could be assembled and be taught the subjects. The local governors of the school approved, and it was contemplated by all parties that the buildings should be used for both elementary and secondary, that is intermediate school purposes.

"The scheme certainly appears to be very sensible and the arrangements received the approval of the Board of Education on November 13, 1911; and by a letter of March 24, 1911, the Welsh Department of the Board of Education wrote to the local education authority: 'Llangollen County School. Sir, I am directed to state that the Board have had under consideration the plans of the extensions to the above-named School enclosed with Messrs. Evans' and Roberts' letter of the 11th ultimo. The plans, which are returned herewith, show the following accommodation:— Cookery and Laundry room, 32 feet by 24 feet for 25 pupils (or 18 public elementary school children) at cookery, laundry and housewifery.' Then the letter goes on to set out the accommodation. 'Subject to what is stated below, the new buildings shown appear to the Board to be generally satisfactory except for the following points:—the lighting of the Art Room should be arranged on the principle of a studio with a long high unbroken window. Further a plan should be submitted to the Board showing the size and position of the proposed new premises in regard to the existing School buildings,' and so forth. 'An estimate of the amount to be expended on the new buildings should also be submitted to the Board with a statement as to the source from which the necessary funds are to be drawn.'

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"The facts with regard to the Llangollen School are as follows: To begin with, the building consists of two floors, a ground and first floor. The first floor is used by the county school pupils only. The elementary pupils use the whole of three rooms on the ground floor, but there is another portion of the ground floor which is common to everybody's use, but the building, taking it as a whole, would not have had to be erected of the size it in fact has been if it had been meant for the county scholars only. The elementary pupils from the eight schools in the four plaintiff parishes attend to the extent of about 120 boys and 120 girls. Four of the schools are provided and four are non-provided.

"The question then arose how to get the money. It was decided to obtain a loan, and again all parties concerned, that is to say the local governors and the local education authority, agreed on the proportion which the intermediate governors should contribute and the proportion which the local education authority should contribute towards the loan. The loan was to be spread over a period of years and be gradually paid off by a sinking fund, and meanwhile an annual sum was payable to the Local Government Board, the lending authority, representing sinking fund and interest. An agreement was come to between the local governors and the local education authority as to the amount each should pay every year as a contribution towards the annual service of the loan. I have no doubt that the apportionment was a fair and just one, and in July, 1918, it was approved by the Board of Education. The amount to be contributed by the various parishes in respect of the use made by the local education authority is set out in paragraph 16 of the Statement of Claim."

Para. 16 of the statement of claim stated that on July 18, 1917, the Finance and General Purposes Committee of the County Council considered a statement showing the amount of principal and interest paid and to be paid by the higher education account on loans raised for the erection, etc., of the new science department at Llangollen County School from November 30, 1912, to November 30, 1917, and a

statement showing the number of scholars from elementary schools registered at the domestic subjects and handicrafts centre during the past four years with the parishes served by the school, and resolved that the elementary education account refund the higher education account the sum of 354*l.* 5*s.* 1*d.* in respect of the years 1915/16 and 1916/17 for the use of the new science department for elementary education purposes made up as follows :—

	£	*s.*	*d.*
Amount of principal and interest on loans paid and to be paid by the higher education account for two years to November 30, 1917	649	10	3
Amount to be raised by special rate in the Llangollen County School district ..	295	5	2
Amount to be refunded from the elementary to higher education account	354	5	1

and further resolved that one-half of the sum of 354*l.* 5*s.* 1*d.* —namely, 177*l.* 2*s.* 6*d.*—be charged on the parishes served by the school in the following proportions in accordance with s. 18, sub-s. 1 (*c*), of the Education Act, 1902—namely :—

	£	*s.*	*d.*
Llangollen Urban	83	10	6
Llangollen Rural	45	7	2
Llantysilio	10	1	7
Chirk	38	3	3
	177	2	6

the elementary schools from which children attend the domestic subjects and handicraft centres being stated to be Llangollen Council, Llangollen non-provided, Llangollen Vron Council, Llangollen Garth Council, Llantysilio non-provided, Pentredwr Council, Chirk Boys and Girls non-provided, Chirk Pentre non-provided. The resolutions were confirmed by the county council on July 27, 1917.

The defendant council on September 26, 1917, issued to the guardians of the Corwen Union a precept for rates for

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the half year ending March 31, 1918, for a sum including the said amounts of 83*l.* 10*s.* 6*d.*, 45*l.* 7*s.* 2*d.*, 10*l.* 1*s.* 7*d.*, 38*l.* 3*s.* 3*d.*, charged on the parishes of Llangollen Urban, Llangollen Rural, Llantysilio and Chirk respectively. The Overseers of those four parishes paid to the guardians of the Corwen Union the whole of the sum so demanded excepting the sums of 83*l.* 10*s.* 6*d.*, 45*l.* 7*s.* 2*d.*, 10*l.* 1*s.* 7*d.* and 38*l.* 3*s.* 3*d.* so charged. The sum demanded in the precept for rates including those four amounts was however in due course paid by the guardians to the Treasurer of the county of Denbigh.

The defendants on April 3, 1918, issued a precept to the guardians of the Corwen Union in respect of the half year ended September 30, 1918, for the sum of 4170*l.* 15*s.* 9*d.*, which sum did not include any special sum or rate in respect of the matters aforesaid charged on any of the said four parishes. The Overseers of the said four parishes paid to the guardians on or before December 30, 1918, the whole of the sum so demanded. The guardians paid to the defendants the full amount demanded from them by the precept in respect of all the parishes in the union less the amounts of 83*l.* 10*s.* 6*d.*, 45*l.* 7*s.* 2*d.*, 10*l.* 1*s.* 7*d.* and 38*l.* 3*s.* 3*d.* demanded in respect of the four parishes of Llangollen Urban, Llangollen Rural, Llantysilio and Chirk in the preceding precept for rates, and which they had paid but had not received from the Overseers of the four parishes.

The defendants alleged that thereupon they became entitled under the County Rates Act, 1852 (15 & 16 Vict. c. 81), to issue warrants to the Overseers of the four parishes to collect and pay to the Treasurer of the county of Denbigh the amount of the rate charged on their respective parishes together with a penal addition to the said rate of 1*s.* in every 10*s.*, and on February 26, 1918, the defendants accordingly issued four warrants to the plaintiffs as Overseers of the four parishes requiring them to collect the whole of the precept for the half year ended September 30, 1918, with the penal addition as set out in para. 18 of the defence.

The plaintiffs claimed various declarations that the

defendants could not under s. 18, sub-s. 1, of the Education Act, 1902, legally charge any of the said expenses on the four parishes, and also injunctions to restrain the defendants from charging or purporting to charge under s. 18, sub-s. 1 (*c*), of the Education Act, 1902, on the four parishes any expenditure which had not been incurred by them in respect of capital expenditure or rent on account of the provision or improvement of a public elementary school.

Evidence was given at the trial that the provisions of the Day School Code had never been complied with at the building in question.

Disturnal K.C. and *Clement Davies* for the defendants. There is a preliminary objection—namely, that the action will not lie at all. The High Court has no jurisdiction to make the declaration asked for—namely, that the defendants are not entitled to charge any of these expenses upon the plaintiff. The proper remedy which the plaintiffs ought to have adopted, and the only method by which they could obtain relief, is by appealing to quarter sessions under s. 22 of the County Rates Act, 1852, against the rates making the charges. It is true that Darling J. held in *Barwick* v. *South Eastern and Chatham Ry. Co.* (1) that the High Court had jurisdiction to entertain such an action, but the decision in that case is under appeal to the Court of Appeal. (2) The hearing of this case ought to be adjourned until after the Court of Appeal have given their decision.

[The further hearing was accordingly adjourned until after the decision of the Court of Appeal.]

1921. Feb. 8. *Konstam K.C.* and *Edwardes Jones* for the plaintiffs. The defendants have no power to charge upon the plaintiff parishes the expenditure they have incurred in respect of the Llangollen County School. The defendants under s. 1 of the Education Act, 1902, as the County Council of Denbighshire became the local education authority, and

(1) [1920] 2 K. B. 387.

(2) The Court of Appeal on July 29, 1920, affirmed the decision of Darling J., as reported [1921] 1 K. B. 187.

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under s. 5 they as the local education authority had the powers and duties of a school board and school attendance committee under the Elementary Education Acts, 1870 to 1900. Under s. 17, sub-s. 8, of the Act of 1902, the powers, duties, property and liabilities of the county governing body constituted under the Welsh Intermediate Education Act, 1889, were to be transferred to the local education authority who were to exercise the powers so transferred. The defendants therefore acted in two capacities, and they were bound to keep them distinct. Under s. 18, sub-s. 1 (*a*), of the Act of 1902, a county council may charge any expenses incurred by them under the Act, with respect to education other than elementary, on any parish or parishes which, in their opinion, are served by the school or college in connection with which the expense has been incurred, but under s. 2 of the Act a rate for the purpose of higher education must not exceed 2*d.* in the pound. As the 2*d.* limit had already been exceeded by the defendants they could not levy a rate under s. 18, sub-s. 1 (*a*), in respect of the expenses incurred by them in regard to the Llangollen school. The defendants therefore sought to charge the expenditure upon the plaintiff parishes under s. 18, sub-s. 1 (*c*), which enables a county council to "charge such portion as they think fit, not being less than one-half or more than three-fourths, of any expenses incurred by them, in respect of capital expenditure or rent on account of the provision or improvement of any public elementary school, on the parish or parishes which, in the opinion of the council, are served by the school." The Llangollen school however is not a public elementary school; it is an intermediate school. It was built upon land and with money under a trust for higher education. The term "elementary school" is defined in s. 3 of the Elementary Education Act, 1870, as "a school or department of a school at which elementary education is the principal part of the education there given, and does not include any school or department of a school at which the ordinary payments in respect of the instruction, from each scholar, exceed ninepence a week." Sect. 7 defines a "public elementary school"

as an "elementary school which is conducted in accordance with the following regulations," of which No. 4 is: "The school shall be conducted in accordance with the conditions required to be fulfilled by an elementary school in order to obtain an annual parliamentary grant." Sect. 97 provides that "the conditions required to be fulfilled by an elementary school in order to obtain an annual parliamentary grant shall be those contained in the minutes of the Education Department in force for the time being. . . . ." That means that the school must comply with the provisions of the Day School Code. Sect. 20 of the Elementary Education Act, 1876, provides that "the conditions required to be fulfilled by schools in order to obtain annual parliamentary grants shall provide that the income of the schools shall be applied only for the purpose of public elementary schools." This school cannot be included in the parliamentary return as a public elementary school, because the provisions of the Day School Code are not complied with. The fact that special subjects are taught in the school, and that the special subject grant is earned, does not make the school a public elementary school. No expenses have been incurred by the defendant on the provision or improvement of any public elementary schools in the parishes in question; the expenses which have been incurred have been spent in providing or improving an intermediate school and the defendants are not entitled under s. 18, sub-s. 1 (*c*), of the Act of 1902 to charge that expense on the plaintiff parishes. Further, this rate is bad for retrospection. Under s. 68, sub-s. 9, of the Local Government Act, 1888, county contributions may be made retrospective in order to raise money for the payment of costs incurred within six months before the demand of the contributions. But the plaintiffs issued a precept in 1918 which included a demand for expenses incurred in the years 1915/16 and 1916/17. The defendants cannot by transferring the amount from the higher education account to the elementary education account get rid of the limitations imposed upon the exercise of their functions as the higher education authority.

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It was held in *Rex* v. *Flintshire Justices* (1) that an order of sessions for assessing and levying a specific sum of money to enable a county treasurer to repay persons who had advanced money for county purposes on the credit of the county rates was bad on the face of it, inasmuch as it was a rate to reimburse, which the sessions had no authority to make.

Clement Davies (*Disturnal K.C.* with him) for the defendants. The expense incurred by the defendants was incurred in the improvement of a public elementary school or in the provision of a new public elementary school which serves the parishes upon which the rate was levied. When the school was built it was intended that it should be used both for elementary education and also for higher education, and it was so used with the approval of the Board of Education. The school is a public elementary school. The term "elementary school" is defined in s. 3 of the Act of 1870 as a school in which elementary education is the principal part of the education there given. An elementary school may be a public elementary school even although it does not comply with the regulations contained in the Day School Code. This building may be called a public elementary school carried on at four provided and four non-provided schools in the parishes upon which the rate was levied. The building had to be provided in order that the special subjects might be taught and those subjects had to be taught in order that the grant might be earned, and therefore the expense of providing the building came within s. 18, sub-s. 1 (*c*), of the Act of 1902. The expense of bringing the children to the place where the special subjects were taught came out of the elementary rate and therefore the expense of providing the place itself ought also to come out of the elementary rate. The rate was ascertained and the precept issued within six months from the date of the demand, and therefore the rate is not bad for retrospection. The expense did not become chargeable until it was ascertained and transferred from the higher education account to the elementary education account.

(1) (1822) 5 B. & Al. 761.

Konstam K.C. in reply. The school has never been recognized by the Board of Education as a public elementary school. With regard to retrospection the material date is the date when the county council became liable to pay third parties in respect of the expenses that had been incurred and not the date when the county council, having ascertained the amount, transferred the amount to the elementary education account.

Cur. adv. vult.

1921. Feb. 15. SANKEY J. read the following judgment: In this case several parishes in the county of Denbigh ask for various declarations that certain expenses incurred by the county council cannot be charged against the parishes under s. 18, sub-s. 1 (*c*), of the Education Act, 1902, and an injunction to restrain the defendants so charging or purporting to charge them.

The defendants contend they were entitled to so charge, and further took a preliminary point that the declaration sought for cannot be granted, because the only method by which the plaintiffs can obtain relief is to appeal to quarter sessions against the rate making the charges.

The learned counsel for the defendants asked me to postpone my judgment on the preliminary point till a case in which he was engaged and which was on its way to the Court of Appeal had been decided by that Court. I was informed that judgment had been delivered by the Court in that case contrary to the learned counsel's contention and the preliminary point is now abandoned.

The facts are as follows [His Lordship then stated the facts as set out above and continued:] The dispute between the parties is this: The plaintiffs say that this amount ought to be spread over and paid for by the whole county. The defendants say it ought to be paid for by the parishes whose elementary school children actually used the intermediate school. This depends upon the Education Act, 1902, s. 18, sub-s. 1 (*c*), which is as follows: "The county council shall charge such portion as they think fit,

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not being less than one-half or more than three-fourths, of any expenses incurred by them, in respect of capital expenditure or rent on account of the provision or improvement of any public elementary school, on the parish or parishes which, in the opinion of the council, are served by the school." The question, therefore, is, Is the sum an expense incurred by the defendants in respect of capital expenditure or rent on account of the provision or improvement of any public elementary school ?

The plaintiffs say : (1.) The Llangollen school is an intermediate school, and not a public elementary school, and therefore the sum of money in question is not an expenditure or rent on account of the provision of a public elementary school. (2.) Nothing has been spent on the schools in the parishes in question, and what has been borrowed and spent has been borrowed and spent in providing an intermediate school and not a public elementary school.

The defendants contend that the building in question is : (1.) The intermediate school. (2.) It is an elementary school both provided and non-provided for the parish of Llangollen Urban. (3.) That it is a provided school for Llangollen Rural. (4.) That it is a provided and non-provided school for Llantysilio. (5.) That it is a non-provided school for Chirk. This contention seems to me to be extravagant. They further contend that it is a public elementary school within the meaning of s. 18, sub-s. 1 (*c*), of the Act of 1902, which I have just read.

As far as it is a question of fact I find this building is not a public elementary school. The question then arises : Does it come within the meaning of the words in s. 18, sub-s. 1 (*c*) ? The definition of " elementary school " will be found in s. 3 and in s. 7 of the Elementary Education Act, 1870, and it is as follows : Sect. 3 provides : " In this Act . . . . the term ' elementary school ' means a school or department of a school at which elementary education is the principal part of the education there given, and does not include any school or department of a school at which the ordinary payments in respect of the instruction, from each scholar,

exceed ninepence a week." Sect. 7 provides: "Every elementary school which is conducted in accordance with the following regulations shall be a public elementary school within the meaning of this Act; and every public elementary school shall be conducted in accordance with the following regulations (a copy of which regulations shall be conspicuously put up in every such school)." No. 4 of those regulations provides that "The school shall be conducted in accordance with the conditions required to be fulfilled by an elementary school in order to obtain an annual parliamentary grant." By s. 97 of the Act it is provided as follows: "The conditions required to be fulfilled by an elementary school in order to obtain an annual parliamentary grant shall be those contained in the minutes of the Education Department in force for the time being. . . ."

It was stated by the first witness for the plaintiffs, Mr. Edwin Foulkes Jones, that the conditions of what is known as the Day School Code had never been complied with at the building in question. That Code contains the regulations in accordance with which every elementary school must be conducted in order to be a public elementary school within the meaning of the Act.

In these circumstances, I am of opinion that the building in question does not come within those sections, and I have therefore arrived at the conclusion that this school is not a public elementary school within the meaning of sub-s. 1 (*c*) of s. 18 of the Act of 1902, and that the contentions of the plaintiffs both in fact and in law are right and that they are entitled to the declarations and injunctions appropriate to my findings.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Hammond & Richards, for C. Richards & Sons, Llangollen.*

Solicitors for defendants: *Worthington Evans, Dauney & Co., for W. R. Evans & Jones, Ruthin.*

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NOTE.

The agreed minutes of the declarations and injunctions granted were as follows:—

"The Court doth declare:—

"1. That the expense of providing the new science and art department of the Llangollen County School, referred to in paragraph 6 of the statement of claim, was incurred by the defendants as the governing body of that school, and not as a local education authority acting under Part III. of the Education Act, 1902.

"2. That the said expenses were expenses expended in respect of education other than elementary, and were properly paid out of rates levied over the whole of the administrative county of Denbigh.

"3. That neither Llangollen County School nor the new science and art departments thereof was or were a public elementary school, and that none of the expenses incurred by the defendants in respect of capital expenditure or rent on account of the provision or improvement of Llangollen County School or of the said new science and art departments were expenses incurred in respect of capital expenditure or rent on account of the provision or improvement of any public elementary school.

"4. That the defendants could not legally charge any of the said expenses under s. 18, sub-s. 1 (*c*), of the Education Act, 1902, on the parish or parishes which in the opinion of the defendants were served by the said school or by the said departments thereof, or on all or any of the parishes of Llangollen Urban, Llangollen Rural, Llantysilio and Chirk.

"And the Court doth order that the defendants be restrained from:—

"1. Charging or purporting to charge under s. 18, sub-s. 1 (*c*), of the Education Act, 1902, on the parishes of Llangollen Urban, Llangollen Rural, Llantysilio, and Chirk, or any of them, any of the expenditure referred to in paragraph 16 of the statement of claim, or any other expenditure incurred by them in respect of education other than elementary, or any other expenditure which has not been incurred in respect of capital expenditure or rent on account of the provision or improvement of a public elementary school.

"2. Issuing any precept or sealing any warrant or applying for or distraining or otherwise enforcing any warrant or taking any other proceeding to enforce payment of any portion of the expenditure referred to in paragraph 16 of the statement of claim, or to enforce either of the warrants referred to in para. 18 of the defence.

"3. Levying any sum on any of the parishes of Llangollen Urban, Llangollen Rural, Llantysilio and Chirk as expenses incurred under Part III. of the Education Act, 1902, which has been paid or ought to be paid out of higher education account or out of any other fund which is raised over the whole of the said administrative county."

R. F. S.

Distinguished. ASKEY v. GOLDEN VINE CO., LTD. [1948] 2 All E.R. 35.
Approved: Gray v. Barr: CA. 1971. 3. All E.R.

TINLINE *v.* WHITE CROSS INSURANCE ASSOCIATION, LIMITED.

1921
April 29;
May 13.

[1921. T. 413.]

Insurance (Accident)—Motor-car—Indemnity against Claims by third Parties for "accidental personal injury"—Motor-car driven at excessive Speed—"Accident"—Two Persons injured and One killed—Right to Indemnity—Public Policy.

By a policy of insurance the assured was entitled to be indemnified against (inter alia) sums which he should become legally liable to pay to third parties as compensation for "accidental personal injury" caused through the driving of his motor-car. While driving his car at an excessive speed the assured knocked down three persons, injuring two and killing one, and in respect of this occurrence he was convicted of manslaughter on his own confession. Actions having been commenced against him by the injured persons and by the representative of the person who was killed, for damages, the assured sued the insurance company for a declaration that he was entitled to be indemnified in respect of those claims:—

Held, that the policy protected the assured against the civil consequences of accidents due to negligence, whether slight or great, that the injuries to the two persons and the death of the third were due to an "accident" within the meaning of the policy, that a policy covering risks of this nature was not void as against public policy, and, therefore, that the assured was entitled to the declaration claimed.

ACTION tried by Bailhache J.

The plaintiff, who was at all material times the owner of a Bianchi 20 h.p. motor-car, claimed a declaration that he was entitled to be indemnified by the defendants in respect of all claims made against him by certain third parties.

By a policy of insurance dated July 26, 1920, the plaintiff was insured by the defendants from July 18, 1920, to July 18, 1921, in respect of (inter alia) "sums which the assured shall become legally liable to pay to any other person . . . . as compensation for accidental personal injury . . . . sustained or caused through the driving of the automobile." It was a condition of the policy that notice in writing should be given to the defendants by the plaintiff of any accident.

During the currency of the policy—namely, on November 4, 1920—the plaintiff was driving his motor-car along Shaftesbury Avenue when he ran into and knocked down

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three persons who were crossing the street, injuring two and killing the third. In respect of this occurrence the plaintiff was charged with manslaughter. On his first trial the jury disagreed, and on the second he, on the advice of his counsel, pleaded guilty and was bound over.

Shortly after the accident actions were commenced against the plaintiff by the two injured persons and by the executrix of the man who was killed on behalf of his widow and infant child. Notice in writing of these claims was given by the plaintiff to the defendants, who repudiated all liability, whereupon the plaintiff brought this action claiming a declaration that he was entitled to be indemnified in respect of those claims.

The defendants alleged that the said death and injuries were directly caused owing to the fact that the plaintiff at the time in question was in the course of doing criminal acts by reason of the fact that he was drunk and was driving his motor-car to the danger of the public; that he voluntarily increased the risk the defendants had to bear under the policy and that the death and injuries were directly attributable to that increased risk; and, further, that the insurance was contrary to public policy if and so far as it could be held to be an indemnity against the consequences of the plaintiff's criminal acts.

Evidence was given, and the judge found as a fact that the plaintiff was not drunk at the time in question, but that he was driving his car at an excessive speed.

Barrington-Ward K.C. and *J. D. Cassels* for the plaintiff. The material provision in the policy sued on indemnifies the plaintiff in respect of compensation which he shall become legally liable to pay to third parties for "accidental personal injury," caused through the driving of his motor-car. The plaintiff's act out of which his claim under the policy arises was accidental, and he is therefore entitled to the declaration asked for.

Stuart Bevan K.C. and *Jowitt* for the defendants. This policy does not protect the plaintiff where the loss or damage

arises out of the commission by him of a criminal offence. It has been held in several cases that there cannot be an indemnity against the consequences of the publication of a libel: *Colburn* v. *Patmore* (1); *Shackell* v. *Rosier* (2); and *W. H. Smith & Son* v. *Clinton*. (3) In actions on marine policies it has been held that an increase of risk to the subject-matter of insurance, though that increase of risk is caused by the assured, does not avoid the insurance, unless indeed the particular act is prohibited by the policy; but that principle applies only where there has been no violation of the law by the assured: see *Thompson* v. *Hopper* (4) and *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.* (5) The principle applicable was clearly enunciated by Kennedy J. in *Burrows* v. *Rhodes* (6) where he said (7): "It has, I think, long been settled law that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. An express promise of indemnity to him for the commission of such an act is void." See also *Weld-Blundell* v. *Stephens*. (8) If the policy is to be construed as if it contained a clause giving the assured an indemnity against the civil consequences of manslaughter it would be void on grounds of public policy: *Amicable Society* v. *Bolland*. (9)

Barrington-Ward K.C. in reply. The policy was designed to protect the plaintiff from liability for all accidents except those due to his wilful act. The act in question was clearly accidental and not intentional.

BAILHACHE J. In this case the plaintiff claims a declaration that he is entitled to be indemnified against the consequences of an accident which occurred in Shaftesbury

(1) (1834) 1 C. M. & R. 73.
(2) (1836) 2 Bing. N. C. 634.
(3) (1908) 99 L. T. 840.
(4) (1858) E. B. & E. 1038, 1049.
(5) [1898] 2 Q. B. 114, 124.
(6) [1899] 1 Q. B. 816.
(7) Ibid. 828.
(8) [1919] 1 K. B. 520, 539.
(9) (1830) 4 Bli. N. S. 194.

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Avenue on the night of November 4, 1920. On that night the plaintiff drove his motor-car at an excessive speed and he ran into three persons who were crossing the road, injuring two and killing the third. In respect of this occurrence the plaintiff was prosecuted for manslaughter. The crime of manslaughter in a case like this consists in driving a motor-car with gross or reckless negligence. Ordinary negligence does not make a man liable for manslaughter. No one has been able to define where the dividing line is to be drawn, but every one agrees that it requires a high degree of negligence to make the offence manslaughter. The allegations against the plaintiff were that he was drunk while in charge of his motor-car and that he was driving at a very high rate of speed. There were two trials. On the first the jury disagreed. On the second the prosecution, with the consent of the judge, withdrew the allegation that the plaintiff was drunk and elected to rely entirely on the allegation that he was driving at an excessive speed, and upon that being done the plaintiff was advised by his counsel to plead guilty to manslaughter and he did so. He therefore was convicted on his own confession of manslaughter, and it must be taken for the purposes of this case that on November 4, 1920, he was guilty of that crime.

The policy sued on indemnifies the assured against sums which he shall become legally liable to pay to any other person as compensation for "accidental personal injury." A man does not become liable to pay compensation for accidental personal injury unless the accident is due to his negligence. The policy therefore is one which insures against the consequences of negligence, including personal negligence. The defendants say however that where the negligence is so gross and excessive that as a result of it a man is killed and the crime of manslaughter is committed the assured cannot claim an indemnity, for it is said it is against public policy to indemnify a person against the civil consequences of his criminal act.

So far as I know this is the first time this defence has been raised upon an indemnity policy. Speaking generally, it is

true to say that it is against public policy to indemnify a man against the consequences of a crime which he knowingly commits, and in the word "crime" I include the breach of any statutory duty which renders a man liable to fine or imprisonment. In motor accidents where the assured is the driver of the motor-car, I suppose that in the great majority of cases the accident is due to the breach by the driver of some enactment. Many of these accidents are due to driving at excessive speed. That was the case here. Driving at an excessive speed—exceeding the speed limit—is a breach of an enactment which subjects the person guilty of it to fine or imprisonment; and if the ordinary law were to be applied to cases of this kind it would be a defence to say that the assured, although he did not intend to commit manslaughter, committed it by violating an enactment — namely, by driving in excess of the speed limit, or by driving to the danger of the public. But it is notorious that that defence is never raised. In *Quinn* v. *Leathem* (1) Lord Halsbury said that the law is not always logical, and every one concerned with the administration of the law knows this. If the law is not logical, public policy is even less logical, for, by common consent, these third party indemnity insurances have been treated as valid and effective. There can be no doubt that if none of the three persons who were knocked down had been killed but all had been injured there would have been no defence to this action. In my opinion the fact that one of the persons was killed makes no difference for this purpose. The policy is against claims for accidents due to negligence, because without negligence there is no liability. Precisely the same negligence which injured the two persons killed the third, but to hold that there is any difference in the liability to indemnify would be to hold that the indemnity depends upon the nature and result of the injury sustained by the person who is knocked down, or, to put it in another way, that it depends in some degree upon the amount of the assured's negligence. That will not do, because there is very often quite as much

(1) [1901] A. C. 495, 506.

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Bailhache J.

negligence in knocking down a person who is not killed as there is in knocking down a person who is killed and whose death makes the person who has knocked him down and killed him guilty of manslaughter. The fact that one of the three persons was killed is, as I have said, really immaterial for the purposes of this case; it was the incident of the accident, or the accident of the accident, an accident due, it is true, to gross negligence, but the policy is an insurance against negligence whether slight or great, and it seems to me that it covers this case. It must of course be clearly understood that if this occurrence had been due to an intentional act on the part of the plaintiff, the policy would not protect him. If a man driving a motor-car at an excessive speed intentionally runs into and kills a man, the result is not manslaughter but murder. Manslaughter is the result of an accident and murder is not, and it is against accident and accident only that this policy insures. The point, as I have said, is a novel one, but for the reasons I have given it fails and the plaintiff is entitled to the declaration asked for.

Judgment for plaintiff.

Solicitors for plaintiff: *Colyer & Colyer.*

Solicitors for defendants: *Oswald Hickson, Collier & Co.*

J. S. H.

[IN THE COURT OF APPEAL.]

C. A.
1921
June 3.

In re PRIOR.

Ex parte PRIOR.

Practice—Charging Order—Bankruptcy—Receiving Order—Payment of Debts in Full—Rescission—Subsequent Judgment Creditor—Order charging Surplus in Hands of Official Receiver—Equitable Execution—Jurisdiction of Registrar—Judgments Extension Act, 1838 (1 & 2 *Vict. c.* 110), *ss.* 12, 14 —*Bankruptcy Act*, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 102—*Bankruptcy Rules*, 1915, *r.* 6.

A debtor, against whom a receiving order had been made, paid money into Court to satisfy his debts in full. The receiving order was then rescinded by an order which directed the Official Receiver after paying the debts and deducting his costs, charges and expenses to pay the balance in his hands to the debtor. A subsequent unsatisfied judgment creditor applied to the Registrar in Bankruptcy for a charging order upon the balance of the fund in the hands of the Official Receiver:—

Held, that the Registrar had jurisdiction to make the order.

APPEAL from an order of the Registrar in Bankruptcy, whereby it was ordered that the debtor's interest in the balance of certain funds in Court in the hands of the Official Receiver, should stand charged with payment of 124*l.* 6*s.* 3*d.* in favour of the debtor's wife, who had obtained judgment against him for that amount, in respect of the costs of an action which he had unsuccessfully brought against her.

On October 7, 1920, a receiving order was made against the debtor. An appeal from that order was dismissed on December 17, 1920. The debtor then paid 1350*l.* into Court, and by an order of February 3, 1921, made upon the application of the debtor for an order to rescind the receiving order on the ground of payment of the debts in full the receiving order was rescinded, and it was further ordered that the Official Receiver should pay the debts in full up to October 7, 1920, and that the balance of the moneys in the hands of the Official Receiver, after the necessary deductions for costs, charges and expenses, should be paid to the debtor.

On December 2, 1920, Astbury J. dismissed with costs an action which the debtor had brought against his wife

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with reference to the title to certain furniture. The costs were taxed at 124*l.* 6*s.* 3*d.*, and, the debtor not having paid them, his wife applied to the Registrar in Bankruptcy for a charging order upon the balance of the moneys in the hands of the Official Receiver. The Registrar made the order now appealed from.

Tindale Davis for the appellant. The Registrar has no jurisdiction to make a charging order by way of equitable execution, and, in any case, cannot charge this fund, which is a cash surplus belonging to the debtor after rescission of the receiving order. The order cannot be made in bankruptcy. When once the receiving order has been rescinded the Registrar is functus officio, except for administration purposes. The proceedings before the Registrar were wrong. His jurisdiction is limited by s. 102 of the Bankruptcy Act, 1914. The application for the charging order ought to have been made to the judge in person : Williams' Bankruptcy Practice, 12th ed., p. 372.

Sect. 102 defines the powers of the Registrar, subject to the general rules ; and r. 7 of the Bankruptcy Rules, 1915, provides that the Registrar may, under the general or special directions of the judge, hear and determine any matter or application referred to in s. 102, sub-s. 2, of the Act. Rule 387 saves the existing practice where no other provision is made by the Act or the rules. Sect. 132 gives power to make general rules provided that they shall not extend the jurisdiction of the Court.

It is submitted that inasmuch as the receiving order was rescinded the Registrar had no power to deal with this matter at all.

[LORD STERNDALE M.R. The proceedings were not at an end.]

As soon as the debts were paid in full the balance in the hands of the Official Receiver belonged to the debtor : *Flower* v. *Lyme Regis Corporation.* (1) Assuming that the order could be made by the judge, it could not be made by the Registrar.

(1) [1921] 1 K. B. 488.

[The following cases were also referred to: *Brereton* v. *Edwards* (1); *Watts* v. *Jefferyes* (2); *Ex parte Wemyss* (3); *In re Greensill* (4); *In re Wood* (5); *Prout* v. *Gregory* (6); *In re Cook* (7); *In re Deakin.* (8)]

O'Hagan for the respondent was not called upon.

LORD STERNDALE M.R. [after stating the facts]. In these circumstances the wife applied for a charging order upon the balance of money in the hands of the Official Receiver. It is not disputed that if Horridge J., the judge to whom bankruptcy matters are assigned, had made this order he would have had ample jurisdiction to make it, not as a judge to whom bankruptcy matters are assigned, but under his general jurisdiction as a judge of the King's Bench Division of the High Court of Justice; and it was not disputed that, that being so, a Master of the King's Bench Division could have dealt with the matter, if it were one capable of being dealt with in chambers. That depends on the rules applicable to the King's Bench Division dealing with the powers which the judge or a Master may exercise. But it is said that the learned judge would not have had power or jurisdiction to make the charging order as a judge in bankruptcy. I respectfully object to the expression, "Judge in bankruptcy," being used in this matter. There is no such thing as a judge in bankruptcy. There is no separate bankruptcy Court. It is the judge of the King's Bench Division to whom for the time being bankruptcy matters are assigned. It is said that sitting in the exercise of his bankruptcy jurisdiction he would not have had the right to make this order, and, that being so, the Registrar in Bankruptcy, who has only the powers in chambers of a judge exercising his bankruptcy jurisdiction, cannot make the order.

That a charging order can be made under circumstances of this kind seems to me not a matter of controversy in this

(1) (1888) 21 Q. B. D. 488.
(2) (1851) 3 Mac. & G. 422.
(3) (1884) 13 Q. B. D. 244.
(4) (1872) L. R. 8 C. P. 24.
(5) [1897] 1 Q. B. 314.
(6) (1889) 24 Q. B. D. 281.
(7) [1899] 1 Q. B. 863.
(8) [1900] 2 Q. B. 489.

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Court. It might have been open to question whether "charging order" was the proper term to apply to the order which was made, but that seems to me to have been determined for us in *Brereton* v. *Edwards*. (1) I say it might have been open for this reason; this order is not made under s. 14 of 1 & 2 Vict. c. 110, because that does not give any power to deal with cash or money; it is made not directly but indirectly under s. 12 of the Act, which gives the right to take in execution, amongst other things, money. It has also been decided that where the money, instead of being in a place where the sheriff can seize it, is in the hands of the Paymaster-General, or of an officer of the Court, for the judgment debtor, there, in order to prevent the execution creditor being deprived of his right under s. 12, by reason of his not being able to levy on the moneys in the hands of an officer of the Court, or a public officer like the Paymaster-General, an order would be made that the money shall be dealt with as if it had been seized and paid to the judgment creditor. That was decided by Lord Truro in *Watts* v. *Jefferyes* (2), where a sum of 500*l.* had been ordered to be paid to the judgment debtor and a cheque had been actually drawn for the purpose of paying the money. I do not know whether it was termed a charging order or not, but an order was made that that cheque should be handed over to the judgment creditor in satisfaction of the debt. That being so, it is necessary to look at the position in which this money was. It was in the hands of the Official Receiver under an order of February 3, 1921, by which it was ordered "that the receiving order dated October 7 be rescinded, and the same is hereby rescinded, and it is further ordered that the Official Receiver do pay the debts of the Debtor on the footing of his said report to this Honourable Court, and that the balance of the moneys in his hands, after deducting all fees, costs, charges and expenses, be paid to the Debtor," so that the order was just the same as the order in Chancery in *Watts* v. *Jefferyes* (2)—namely, that the money be paid to the debtor, the only difference being that here the Official Receiver,

(1) 21 Q. B. D. 226, 488. (2) 3 Mac. & G. 422.

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before paying it over, was to deduct his fees, costs, charges and expenses, and, of course, the judgment creditor would only get it subject to that deduction. Therefore in substance there is no objection to this charging order at all. The only real objection, if I may call it a real one, is that the judge ought to have made it and not the Registrar, the purest possible technicality. Admitted that Horridge J., to whom bankruptcy business is assigned, might have made the order without saying in what capacity he made it, it would have been perfectly good. But it is contended that the Registrar cannot do it, because, if Horridge J. said he was doing it in the exercise of his bankruptcy jurisdiction he would have been wrong. Certainly in *Brereton* v. *Edwards* (1) the power to make the order was based on the general jurisdiction of a judge of the High Court; but I think there is no ground for saying here that the judge was not capable of making it in the exercise of his bankruptcy jurisdiction, and for this reason, the money was in the hands of an officer of the Court for purposes of the bankruptcy jurisdiction which is entrusted to the judge, and that seems to me to put him in the same position as, we will say, an official of the Chancery Division would be, where undoubtedly the judge of the Chancery Division could have dealt with the matter. I assume that the jurisdiction wherever it arises is in the judge, and it seems to me that in those circumstances a judge, who has the power and the will to assist the execution of the judgment creditor under s. 12, upon funds which are in the hands of an officer, who is subject to him in his bankruptcy jurisdiction, has a right to make an order in the exercise of that jurisdiction. In *In re Wood* (2), upon which the appellant relied, where it was said that the judge could not make a charging order under the Solicitors Act, 1860, in the exercise of his bankruptcy jurisdiction, the money was not in the hands of an official who was under him in the discharge of his bankruptcy jurisdiction, which seems to me to make a considerable amount of difference.

(1) 21 Q. B. D. 488.

(2) [1897] 1 Q. B. 314.

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If the judge sitting in the exercise of his bankruptcy jurisdiction could make this order, I think there is no question that the Registrar also could make it, and as I think the judge could in this particular case have made the order in the exercise of his bankruptcy jurisdiction, I think that the Registrar has the same jurisdiction. The appeal therefore fails and should be dismissed with costs.

ATKIN L.J. I agree. This is an appeal from the order of the learned Registrar in bankruptcy, by which he ordered that the debtor's interest in the balance of the fund in the hands of the Official Receiver do stand charged with payment of 124*l.* 6*s.* 3*d.* in favour of the debtor's wife. The first question which arises is whether the judge had jurisdiction to make the order under his bankruptcy jurisdiction or only as a judge of the King's Bench Division. I think it is material to consider how this fund came into existence. It is quite plain that it came into existence by reason of an order of the High Court made under its bankruptcy jurisdiction on February 3, 1921, by which a receiving order, which had been made against the debtor, was rescinded, and directions were given to the Official Receiver as to what he was to do with the fund over which he had control, and had control merely by reason of the fact that a receiving order was originally made. The Official Receiver was directed, notwithstanding the rescission of the receiving order, to pay in full the creditors who had proved, to pay himself his costs and charges, and to pay the balance to the debtor. It was therefore by reason of an order in bankruptcy that the Official Receiver under the circumstances had control of the fund.

The debtor's wife had obtained judgment against him, and it was necessary for her to enforce it. What could she do? She could not issue a legal execution against this money, because, if she did that, she would be interfering with the officer who was dealing with the money in pursuance of an order of the High Court, and it is plain that such an interference would not have been permitted.

Therefore legal execution was impossible. The only course she could take in order to satisfy her judgment out of money which was available to the judgment debtor, and which he ought to pay to her, was by some process of equitable execution. To whom ought she to apply for that purpose? That there was jurisdiction to make such an order by way of equitable execution is undoubted. It has been exercised now to the knowledge of all of us for generations, and the express authority to which we have been referred in respect of it is *Brereton* v. *Edwards* (1), where a judge of the King's Bench sitting in chambers, Field J., had made a charging order upon a fund that was standing to the credit of the judgment debtor in a suit in the Chancery Division. The case went to the Court of Appeal, and Lord Esher held that Field J. had power to make the order, because of the Judicature Act, 1873. He says (2): "It seems to me, therefore, that Field J. stood in the same position as if he had been a judge of the Chancery Division, and that he was entitled to make the charging order to assist the creditor in realising his judgment. Then arises the question, in what form ought Field J. to have made the order? Was he bound to go through the ceremony of appointing a receiver, or was he entitled to make a charging order directly in favour of the creditor? Was he bound to make an order that the sheriff should apply to the Chancery Division? In my opinion, both those steps would have been a mere waste of time and money. I think the judge had jurisdiction to make the charging order at once." And at the end of his judgment he says (3): "There need be no flinching from making a charging order in the Chancery Division with regard to any cash, when a creditor has obtained judgment for his debt, and the order is in the nature of an equitable execution in aid of the judgment." Lindley L.J. says the same thing (3): "The first question is, whether there is any mode of procedure by which a judgment creditor can obtain a charge upon cash standing to the credit of the judgment debtor in

(1) 21 Q. B. D. 488. (2) Ibid. 494.

(3) Ibid. 496.

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the Chancery Division." Then he proceeds to say that he can in this method. And Bowen L.J. says (1): "I think the broad principle of law which we are now deciding is this—that any judge of the High Court has power, at the instance of a judgment creditor, to make an effectual order charging the judgment debt upon a sum of money standing to the credit of the judgment debtor in the name of the Paymaster-General in an action in the Chancery Division." Now the result of that case is, in the first place, that the judgment creditor was entitled to relief in this form by way of a charging order upon a fund such as this, and the only question that arises is, to whom ought she to make the application for that relief? I think it appears from *Brereton* v. *Edwards* (2) that she could have made it to the judge in chambers, but I think it also appears that it could be made, and to my mind be made with much more convenience, and much more properly, to the judge exercising his jurisdiction in bankruptcy, because the reason for not being able to get legal execution is, that it would be interfering with the officer of the Court, and this officer of the Court is acting under the directions of the High Court exercising its jurisdiction in bankruptcy. It seems to me to be right and proper that, in the first instance, the applicant should, at any rate if possible, go to the judge in whose jurisdiction the officer is who has the funds in hand. Therefore to my mind it is quite plain that the judge had power to make this order, and had power to make it by reason of the jurisdiction which was given him by the Bankruptcy Act, because it was his officer who was holding this fund by reason of an order made by him in bankruptcy.

The only other question is, it being clear, I think, that the judge exercising jurisdiction in bankruptcy had himself power to make the order, could the order be made by the Registrar? That is a technical question, and I think it is solved by a reference to one section of the Act and the rules. The power under s. 102 of the Bankruptcy Act, 1914, is subject to general rules, the Registrar has power to make any order

(1) 21 Q. B. D. 498. (2) Ibid. 488.

or exercise any jurisdiction which under any rule is properly made or exercised in chambers. Is there such a rule? We turn to the rules, and we find r. 6, which provides that the following matters and applications shall be heard and determined in Court, and they do not include power to make a charging order; and then it adds "any other application may be heard and determined in chambers." So that the jurisdiction of the Registrar seems to be quite neatly provided for by the rules; in fact it is extremely convenient that the Registrar should have that power, because it is the Registrar himself who makes the order rescinding the receiving order and gives the direction to the Official Receiver as to what he shall do with the fund; and, by analogy, in the King's Bench Division the Master in chambers has power to make this kind of charging order, and makes it constantly, and I can see no reason why the Registrar should not have similar power. At any rate, it is given to him, and, therefore, it appears to me that this order was properly made and that this appeal should be dismissed.

YOUNGER L.J. I agree. In my judgment the order appealed from was in substance correct, while in form it is justified by authority which is binding upon us. The fund in question was in the hands of the Official Receiver under an order of the Court of Bankruptcy directing it in a particular event to be paid to the debtor. In those circumstances, while the fund was in the hands of the Official Receiver as an officer of the Court, although it was so circumstanced as to be reached by this judgment creditor of the debtor under and by virtue of s. 12 of 1 & 2 Vict. c. 110, it was not capable of being reached without the leave of the Bankruptcy Court, in the hands of whose officer it was, without the person claiming or seeking so to reach it, thereby being in danger of committing a contempt. Accordingly the natural and proper course for the execution creditor to take was to apply to the Court in the hands of whose officer this fund was, for an order that notwithstanding the fact that the order putting it in his hands had been made, he should be

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directed, or at least be at liberty, to pay to the judgment creditor out of that fund the sum which by the order was payable to her. That would be the normal and proper course to take in the case of a fund of this sort in the hands of an officer of the Court, and it would be to the Court, in the hands of whose officer that fund was, that the application would properly, and, before the Judicature Act, I think necessarily have had to, be made. In other words, in my judgment, apart from the form in which this order is made, the real justification for it is to be found in Lord Truro's judgment in *Watts* v. *Jefferyes* (1), and I cannot do better by way of an accurate description of that decision than read Lindley L.J.'s description of it in his judgment in *Brereton* v. *Edwards*. (2) There Lindley L.J. says this: "Lord Truro L.C., acting, not under the Act," that is to say, 1 & 2 Vict. c. 110, s. 12, "but by analogy to it, held that the Court of Chancery ought not to prevent the sheriff from seizing under a fi. fa. a cheque which the Accountant-General of the Court had drawn in favour of the judgment debtor, and which was then in the Accountant-General's hands. That case goes a very long way, for it shews that, where there was property of a judgment debtor which could be seized under a fi. fa., that property could be reached by the judgment creditor, although it was in the custody of the Court of Chancery. After consulting our colleagues in the other division of this Court, we think that there is no reason in principle why cash standing to the credit of a judgment debtor in the Chancery Division should not be handed over to his judgment creditor, there being no authority or practice to the contrary." So far it will be seen the Lord Justice is referring to an order made by the Court of Chancery in respect of a fund which was under the control of that Court. The difficulty in *Brereton* v. *Edwards* (3), apart from the form of the order, was to find whether there was any jurisdiction in the King's Bench Division to make an order with regard to a fund that was at the moment under the control of the

(1) 3 Mac. & G. 422. (2) 21 Q. B. D. 497.
(3) Ibid. 488.

Court in the Chancery Division, and it was held in *Brereton* v. *Edwards* (1) that the effect of the Judicature Act was to enable the judge of any Division to make such an order with regard to a fund standing in Court in any other. But *Watts* v. *Jefferyes* (2) was in no way touched as to the Court where the fund was, and under whose control it was, being the Court to which, naturally, the application for leave to deal with it should be made. And *Brereton* v. *Edwards* (1) is useful too for another purpose, and to my mind when so used becomes conclusive in this case. Although there is no reference to a charging order being the proper form of procedure in a case where the sheriff seeks to levy under s. 12 of the Act 1 & 2 Vict. c. 110, the reference to a charging order being confined to cases under s. 10 and s. 18, which are not the sections with which we have to deal, *Brereton* v. *Edwards* (1) laid it down that it is in substance proper and right in the case of a fund so situated as this is, even although s. 12 does not specially refer to a charging order and seems to imply that a fi. fa. shall have been previously issued without the issuing of a fi. fa. to get at the fund by virtue of a charging order attaching it. It seems to me, therefore, to be clearly laid down by these two decisions that, first of all, the Court in Bankruptcy, inasmuch as the fund is in the hands of one of its officers, is the Court to which the application should be made for leave to get at this fund, that would have been available for the execution creditor, if it were not in the hands of an officer of the Court, and, secondly, that, that application being properly made to the Court in Bankruptcy, the appropriate form of order is a charging order, although that is not the order expressly mentioned in s. 12 of 1 & 2 Vict. c. 110, under which the right to get at the fund at all has to be found. Therefore we have everything here, as it seems to me, from that point of view, quite clear. The order was made by the Registrar as a judge of the Court of Bankruptcy; it was properly so made; it is an order which, as made by a judge of the Court of Bankruptcy, may properly be made in

(1) 21 Q. B. D. 488. (2) 3 Mac. & G. 422.

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chambers, and so soon as it is found to be an order of that Court and properly made in chambers, then there can be no doubt whatsoever that it is properly made by the Registrar in chambers. Accordingly I think this appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *Woodthorpe, Browne & Co.; C. H. Heddon.*

G. A. S.

C. A. 1921 *May* 24, 25, 26.

[IN THE COURT OF APPEAL.]

WANKIE COLLIERY COMPANY, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Excess Profits Duty—Trade or Business—Change of Ownership—Liability of Owners for Duty in respect of Profits made by Predecessors—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* 5, *c.* 89), *s.* 38; *s.* 45, *sub-s.* 2.

Sect. 38, sub-s. 1, of the Finance (No. 2) Act, 1915, provides that a duty, known as the "excess profits duty," shall be charged, levied, and paid on the amount by which the profits arising from any trade or business to which Part III. of the Act applies, in any accounting period which ended after August 4, 1914, and before July 1, 1915, exceeded by more than 200*l.* the pre-war standard of profits.

Sub-s. 2 provides that the accounting period shall be taken to be the period for which the accounts of the trade or business have been made up, and where the accounts have not been made up for any definite period, or for the period for which they have been usually made up, or a year or more has elapsed without accounts being made up, shall be taken to be such period not being less than six months or more than a year ending on such a date as the Commissioners of Inland Revenue may determine.

By s. 45, sub-s. 2: "The duty may be assessed on any person for the time being owning or carrying on the trade or business or acting as agent for that person in carrying on the trade or business, or, where a trade or business has ceased, on the person who owned or carried on the trade or business or acted as agent in carrying on the trade or business immediately before the time at which the trade or business ceased, and where there has been a change of ownership of the trade or business, the Commissioners of Inland Revenue may, if they think fit, take the accounting period as the period ending on the date on which the ownership has so changed and assess the duty on the person who owned or carried on the trade or business or acted as agent for the person carrying on the trade or business at that date."

A company owning a business was wound up voluntarily, its business and all its assets being sold to a new company as from December 31, 1914. The new company, which was incorporated on December 28, 1914, was in September, 1916, assessed to excess profits duty under s. 45 of the Finance (No. 2) Act, 1915, in respect of profits made by the company which had been wound up during the accounting periods August 31, 1913, to August 31, 1914, and from August 31, 1914, to December, 1914:—

Held, by Lord Sterndale M.R. and Younger L.J., Atkin L.J. dissenting, that the persons to be assessed to excess profits duty under s. 45, sub-s. 2, of the Finance (No. 2) Act, 1915, were the persons for the time being, that is, at the time the assessment was made, owning or carrying on the business, and not the persons who were owning or carrying it on at a past date, that is, during the accounting period in respect of which the assessment was made, and that if in any particular case it appeared to the Commissioners unjust to assess such persons the Commissioners had power under the sub-section to obviate that injustice and might be trusted to do so.

Dictum of Lord Finlay in *John Smith & Son* v. *Inland Revenue* (1921) 58 S. L. R. 313, 316 dissented from.

Held, by Atkin L.J., agreeing with Rowlatt J., that the persons to be assessed under the sub-section were the persons who owned the trade or business during the accounting period, even though there had been a change of ownership at the end of the accounting period.

Decision of Rowlatt J. [1920] 3 K. B. 287 reversed.

APPEAL from a decision of Rowlatt J. (1) on a case stated by the Commissioners for the General Purposes of the Income Tax Acts for the City of London under s. 45, sub-s. 5, of the Finance (No. 2) Act, 1915, and s. 59 of the Taxes Management Act, 1880.

At a meeting of the Commissioners held on January 28, 1919, the Wankie Colliery Co., Ld. (hereinafter called "the company"), appealed against assessments made upon them to excess profits duty by the Commissioners of Inland Revenue under the provisions of the Finance (No. 2) Act, 1915, Part III., as follows:—

Accounting period, August 31, 1913, to August 31, 1914, net amount of excess profits, 22,000*l.* Rate 50 per cent. Duty payable, 5000*l.*

Accounting period, August 31, 1914, to December 31, 1914, net amount of excess profits, 8333*l.* Rate, 60 per cent. Duty payable, 5000*l.*

The company was incorporated under the Companies Acts,

(1) [1920] 3 K. B. 287.

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1908 and 1913, on December 28, 1914, with a capital of 410,000*l.*, divided into 820,000 shares of ten shillings each.

The objects for which the company was established included the following: "to purchase certain coal-bearing properties in Rhodesia, South Africa, and the business of the Wankie Colliery Co., Ld. (Incorporated in 1909), carried on there as a going concern, and for this purpose to enter into and carry into effect with or without modification an agreement made between the Wankie Colliery Co., Ld. (Incorporated in 1909), and Alfred Wilson Bird its liquidator of the one part and the company of the other part in the terms of the draft, a copy whereof has for the purpose of identification been subscribed by George Stanley Pott, a solicitor of the Supreme Court."

By an agreement dated December 30, 1914, and made between the Wankie Colliery Co., Ld. (Incorporated in 1909, therein and hereinafter referred to as "the old company"), and Alfred Wilson Bird, the liquidator thereof, of the one part and the company of the other part (being the agreement mentioned in the preceding paragraph), after reciting (inter alia) that by special resolutions of the old company passed and confirmed at extraordinary general meetings thereof held respectively December 8 and 23, 1914, it was resolved: (1.) that it was desirable to reconstruct the old company and accordingly that the old company be wound up voluntarily, and that the said Alfred Wilson Bird should be and he was thereby appointed a liquidator for the purpose of such winding up, and that the said liquidator be and he was thereby authorized to divide all the assets of the company amongst the members in specie and to exercise all or any of his powers by attorney, including a power to sub-delegate; (2.) that the said liquidator should be and he was thereby authorized to consent to the registration of a new company to be named "Wankie Colliery Co., Ld." (or some similar name), with a memorandum and articles of association as therein mentioned; (3.) that the draft resolution in the agreement referred to (being the draft of these presents) should be and the same was thereby approved, and that the said liquidator

should be and he was thereby authorized pursuant to s. 192 of the Companies (Consolidation) Act, 1908, to enter into an agreement with such new company (when incorporated) in the terms of the said draft and to carry the same into effect with such (if any) modifications as he might think expedient, it was agreed (inter alia) as follows :—

"(1.) The old company and its liquidator shall transfer and the new company shall take over all and singular the colliery, mining property, lands, grants, buildings, goods, chattels, moneys (except as hereinafter mentioned), credits, debts, bills, notes and things in action of the old company and the undertaking and business thereof with the full benefit of all contracts and engagements and of all securities in respect of the said things in action to which the old company is entitled and all other the real and personal property of the old company whatsoever and wheresoever as on the 31st day of December, 1914.

"(2.) As part of the consideration for the said transfer the new company shall undertake, pay, satisfy and discharge all the debts, liabilities and obligations of the old company whatsoever and shall adopt, perform and fulfil all contracts and engagements now binding on it and shall at all times keep the old company and its liquidator and contributories indemnified against such debts, liabilities, obligations, contracts and engagements and against all actions, proceedings, costs, damages, claims and demands in respect thereof.

"(3.) As further part of the consideration for the said transfer the new company shall pay and at all times hereafter keep the old company and its liquidator and contributories indemnified against all costs and expenses of and incident to the winding up of the old company and of carrying the said transfer into effect. The liquidator shall nevertheless out of the moneys of the old company pay off and redeem 7000*l.* of the debentures of the old company which have been drawn for redemption and are payable on the 31 Dec., 1914, and all interest due on the outstanding debentures and also retain a sum of 20,261*l.* 13*s.* out of the assets for distribution amongst the members of the old company.

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"(4.) As further part of the consideration for the said transfer the new company shall allot and issue to each debenture holder of the old company one debenture of the new company of 100*l.* in respect of each debenture of the old company of 100*l.* held by him or her on the footing that the same shall be accepted in full satisfaction of such debentures and that such debentures shall be surrendered to the new company in accordance with the provisions of the agreement dated the 24th day of November, 1914, and made between the Fanti Consolidated Mines, Ld., on behalf of itself and all other the holders of the debentures of the old company of the one part and the old company of the other part. The debentures of the new company to be issued as aforesaid are to belong to a series of 93,000*l.* like debentures which are to be in the same form and secured by a trust deed framed in the terms of the drafts which for purposes of identification have been subscribed by George Stanley Pott, a solicitor of the Supreme Court.

"(5.) As to the residue of the consideration for the said transfer the new company shall allot to the liquidator of the old company or his nominees 810,446 fully paid shares of ten shillings each of the new company to the intent that the same may be distributed amongst the members of the old company in the proportion of two fully paid shares in the new company in respect of each fully paid share held by them in the old company."

On January 1, 1915, the company received the certificate of the Registrar of Companies entitling them to commence business.

The consideration for the transfer of the assets and the undertaking of the old company set out in clause 1 of the agreement of December 30, 1914, was duly paid and distributed among the persons entitled under the provisions of the said agreement, the terms of which were fully carried out. The final meeting of the old company under s. 195 of the Companies (Consolidation) Act, 1908, was held on October 14, 1915. The final return of the old company was filed on October 18, 1915.

The Finance (No. 2) Act, 1915, received the Royal assent on December 23, 1915. The assessments in question were made on September 5, 1916.

The company contended that under the circumstances aforesaid they could not be made liable for excess profits duty in respect of profits which arose before they were incorporated and which were the property of and had been distributed by a company which had been fully wound up before the charging Act was passed.

They further contended that the present company was in law a separate entity from the old company and that "the person for the time being owning or carrying on the trade or business" in s. 45, sub-s. 2, of the Finance (No. 2) Act, 1915 (being the person upon whom the duty might be assessed), meant the owner in the years to which the assessments referred. The case of *Cannon Brewery Co.* v. *Gas Light and Coke Co.* (1) was cited.

On behalf of the Commissioners of Inland Revenue it was contended that the assessments in question were correct.

The Commissioners were of opinion that the contentions of the Commissioners of Inland Revenue were correct and confirmed the assessments.

Rowlatt J. held, allowing the appeal, that the persons to be assessed to excess profits duty under s. 45, sub-s. 2, of the Finance (No. 2) Act, 1915, were the persons who owned the trade or business during the accounting period, even though there had been a change of ownership at the end of the accounting period, but that if there had been a change of ownership in the middle of the accounting period without the accounts having been made up the Commissioners might if they thought fit take the date of the change as being the end of an accounting period and assess the person who owned the business at the date of the change in respect of the period prior to the change.

The Commissioners of Inland Revenue appealed.

R. P. Hills (*Sir Gordon Hewart A.-G.* with him) for the appellants. The construction put upon s. 45, sub-s. 2, by

(1) [1904] A. C. 331.

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Rowlatt J. involves the reading of the words "for the time being" as "for the accounting period in question," which is arbitrary and unauthorized. Sect. 38, sub-s. 1, has charged in clear terms all profits accruing within certain periods beginning with a date long anterior to the commencement of the Act. Excess profits duty is primarily a charge not on persons but on trades or businesses, and on profits not of persons but of trades: s. 38, sub-s. 1; s. 39. See also per Rowlatt J. in *Inland Revenue Commissioners* v. *Gittus* (1) and approved by the Master of the Rolls in the same case. (2) The business is regarded as a continuing business irrespective of the persons owning or carrying it on: *Gittus* v. *Inland Revenue Commissioners* (3); *Robbins* v. *Inland Revenue Commissioners* (4); *John Smith & Son* v. *Inland Revenue*. (5) See also ss. 39 and 40 of the Act. The language of s. 45, sub-s. 2, shows that it was the intention of the Legislature to provide means by which the profits of such trades or businesses could be collected notwithstanding any change of ownership. The sub-section consists of three limbs: (1.) The assessment is to be on the person for the time being owning or carrying on the business; (2.) if the business has ceased it is to be made on the person who owned or carried on the business before it ceased; and (3.) if the ownership of the business has changed, the Commissioners at their option can assess the person who owned the business immediately before the change. All these provisions bring out clearly that it is the business and not the person who is being charged. The first limb of the sub-section is plainly wide enough to cover the present case. The second is inconsistent with the idea that the owner can only be charged in respect of the accounting period during which he owned the business. The third is conclusive; it shows (1.) that the business does not cease and become a new business on a change of ownership, and (2.) that to tax the old owner and make a break in the business is entirely within the option of the Commissioners,

(1) [1919] 2 K. B. 766, 776.
(2) [1920] 1 K. B. 564, 574.
(3) [1921] 2 A. C. 81.
(4) [1920] 1 K. B. 51, 67.
(5) 58 S. L. R. 313.

who, if they please, can treat the business as continuing and tax the new owner in respect of its old profits. This option is quite meaningless on any other hypothesis. In the present case the Commissioners have exercised their option in the latter way, and have taxed the new owners of the business in respect of its old profits. The retrospective nature of the tax is in the applicants' favour and not against them. It is obviously a retrospective tax, and Parliament so legislated with its eyes open no doubt owing to war emergency. In order not to lose duty it provided specially for a retrospective means of assessment, treating the business as continuing and taxing the owner whom it could easiest lay hands upon. The hardship is transitory and applies only to periods before the Act. After December 23, 1915, transferees could make their own arrangements.

Sect. 45, sub-s. 2, is a collecting section and not a taxing section, and there is no reason in principle why it should not receive a liberal interpretation: see per Lord Parker in *Drummond* v. *Collins*. (1)

[LORD STERNDALE M.R. This is not a question of collecting, but whether the duty is chargeable on a particular person.]

In construing a taxing Act nothing is to be read and nothing is to be implied, but the Court can only look fairly at the language used: *Cape Brandy Syndicate* v. *Inland Revenue Commissioners*. (2)

[He also referred to the Finance Act, 1918 (8 & 9 Geo. 5, c. 15), s. 35, sub-s. 2, and Finance (No. 2) Act, 1915, Sch. IV., Part II., art. 5.]

Sir John Simon K.C. and *Latter* for the respondents. The words of sub-s. 2 of s. 45 must be given their natural meaning. Before the Court in this case can hold a person liable for duty on profits made by another "distinct words of obligation free from any doubt in their construction must be found": *Cannon Brewery Co.* v. *Gas Light and Coke Co.* (3) One does not start off with the idea that the Act intended to

(1) [1915] A. C. 1011, 1019. (2) [1921] 1 K. B. 64, 71.
(3) [1904] A. C. 331, 338, 339.

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tax a man in respect of profits which he did not make. The sub-section deals with three possible contingencies: (1.) where there is no change in the ownership at all and the business is still being continued; (2.) where there is no change in the ownership, but the business has ceased to be carried on; and (3.) where although the business is being carried on there has been a change of ownership in the middle of an accounting period. The assessment is to be in respect of each accounting period, meaning thereby each relevant accounting period. There is only one problem to be considered when the business ceases. It may not cease at the end of a normal accounting period. In that case the person to be assessed is the person last entitled to the business. The first limb of sub-s. 2 gives a formula which can be applied to the various accounting periods. The third limb of the sub-section is the only one in which you are invited to consider the case of a change of ownership. It only applies where there is a change of ownership during the accounting period. It does not mean that you are to make an aggregate down to the end of the accounting period. It may be a case in which it is necessary to split the accounting period, and the Commissioners may then take the accounting period as ending when the business ceased. An accounting period is a period of not more than a year. The owner taxed is the owner in the relevant period. It is ownership within the accounting period which constitutes the liability to pay. Under s. 133 of the Companies (Consolidation) Act, 1908, it is possible to recall the dead company to life for this purpose.

[ATKIN L.J. The only effect of doing that would be that the liquidator of the old company would call upon the new company to indemnify him against anything he should be called upon to pay in respect of duty.]

If it is correct to say that under the first limb of sub-s. 2 you are to ask yourself who are the persons to be assessed for the successive accounting periods, then there is nothing in the second and third limbs of the sub-section which is inconsistent with that.

R. P. Hills in reply.

LORD STERNDALE M.R. This is an appeal from a decision of Rowlatt J. The real and important question, not a long but a difficult one, is as to the meaning of s. 45, sub-s. 2, of the Finance (No. 2) Act, 1915. The question is really as to the meaning of the opening words of that sub-section, but I do not think that the meaning can be safely ascertained without looking at the whole of the sub-section.

The question arises in circumstances which I take from the case as shortly as I possibly can. There was a certain company called the Wankie Colliery Co. which was carrying on business and owned certain coal mines. It was earning profits and was earning them in a way which, had it continued to carry on business, would have exposed it to the impost on excess profits. But on December 30, 1914, before the Finance (No. 2) Act, 1915, came into operation, that company sold its property to the respondent company, which is also called the Wankie Colliery Co., Ld., and the first company, to which I shall refer as the old company, went into liquidation for the purpose of transferring its business to the respondent company, to which I shall refer as the new company. I do not know whether or not there was any difference in the proprietorship so far as the shareholders were concerned. I think not. It was a reconstruction, but of course the two companies were separate entities. The old company was wound up and dissolved, the final resolution being passed, I think, before the Act came into operation, although the dissolution took place afterwards. For the accounting periods of August 31, 1913, to August 31, 1914, and August 31, 1914, to December 31, 1914, assessments were made upon the new company, and it was against those assessments that that company successfully appealed before Rowlatt J.

The charging section is s. 38 of the Finance (No. 2) Act, 1915. Though that section states that there shall be charged, levied and paid on a certain amount certain excess profits duty, it does not say upon whom the assessment is to be made, but it no doubt gives a charge following the assets upon which the charge is given. Sect. 45, sub-s. 2, is the

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only sub-section, so far as I know, which points to the person or the company upon whom the assessment can be made. That sub-section opens in this way: "The duty may be assessed on any person for the time being owning or carrying on the trade or business or acting as agent for that person in carrying on the trade or business." I pause there for a moment. Some remark was made upon the use of the word "may," instead of the word "shall," but I do not myself attach much importance to that, and for this reason. This is, as I have said, the only sub-section which gives power to assess any person, and therefore it means, as it seems to me, that the duty may be assessed on the "person for the time being owning or carrying on the trade or business," and if it is not assessed upon that person there is no other person upon whom it can be assessed, and therefore it does not seem to me to matter very much whether the word used is "may" or "shall," because if the revenue authorities wish to make an assessment upon any person, which is their way of getting payment, they must make it upon this person and upon no one else, subject of course to the other provisions of the sub-section to which I shall refer directly. Therefore I do not see any difference between the use of the word "may" and the word "shall" for practical purposes in this sub-section.

But the real question is this. When the sub-section says that the duty may be assessed on "any person for the time being owning or carrying on the trade or business" does "for the time being" mean the time of the assessment or does it mean the time of the accounting period? Looking at it simply as a matter of ordinary language, there can in my view be no question about it. The words "for the time being" are not used elsewhere in the Act, but as was pointed out by Younger L.J., there are words somewhat equivalent to them in s. 44, sub-s. 1, which provides that: "The Commissioners of Inland Revenue may, for the purposes of this Part of this Act, require any person engaged in any trade or business to which this Part of this Act applies, or who was so engaged during any accounting period." There is

something to be said for the view perhaps, if it were necessary to go to that sub-section for a guide to the meaning of those words, that it points to the meaning being the person carrying on the business at the time being when the assessment is made. But it also seems to me as a matter of ordinary language, apart from the considerations to the contrary to which I shall refer, that such is prima facie the only reasonable meaning which those words can bear. To put the other construction which Rowlatt J. has put upon them is to interpret "for the time being" as meaning for a time long past, and that is not the ordinary meaning of the words "for the time being." But the argument is this, that to interpret the words "for the time being" as meaning the time of the assessment produces this result, that the sub-section and the whole of the Act provide no means by which a person who is then carrying on the business can obtain an indemnity from the person who in fact made the profits—namely, his predecessor in the ownership or carrying on of the business, and that therefore the result of that interpretation is to inflict a very great hardship and an injustice, and I think it was called sometimes a confiscation of the assessed person's property and money for the payment of excess profits duty on profits which were earned by some one else. But I think, as I shall point out later, that although that is a possible result it is not really one which is very likely to happen having regard to the subsequent provisions of the section. But undoubtedly there is the possibility of that hardship and injustice being imposed upon the person who is carrying on the business at the time of the assessment if he is not the person who was carrying it on during the accounting period, because he did not earn the profits during the accounting period but some one else did, and therefore he is asked to pay some one else's duty. That is a possible result, and it seems to me that it is now pretty well settled that where the fact that a result of that kind may happen is used as a test to ascertain the meaning of the words of a section of an Act, the principle to be applied is this. If the words are ambiguous and are fairly capable of two different

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meanings, one of which will or may work an injustice, and the other will not or may not work an injustice, then the latter interpretation is the one which should be preferred. But if the words are plain then the Court has no right to put an unnatural interpretation upon them simply because the putting of the natural interpretation upon them might work an injustice. It is said that the fact that an injustice might otherwise be produced—it is said would be produced, but I do not think that is correct—is a reason for adopting the interpretation which was adopted by Rowlatt J.

I have read only the opening words, but I must now read the whole of s. 45, sub-s. 2, because in my opinion its subsequent provisions throw very great light upon the meaning of the words which I have already read, and point distinctly in the direction of their meaning the person carrying on the business at the time of the assessment. It runs in this way: "The duty may be assessed on any person for the time being owning or carrying on the trade or business, or acting as agent for that person in carrying on the trade or business, or "—this is the first alternative course which may be pursued —" or, where a trade or business has ceased, on the person who owned or carried on the trade or business or acted as agent in carrying on the trade or business immediately before the time at which the trade or business ceased." If the interpretation adopted by the learned judge be the correct one, then that clause must be read, " or where a trade or business has ceased without there having been a change of the ownership of the business." The first remark I make upon that is that there are no such words in the sub-section, and to put that interpretation upon it involves reading into the sub-section words which are not there. And another point is this, that if that interpretation be put upon that alternative then the words " immediately before the time " are absolutely meaningless, because if there were no change of business then the person who was carrying on the business up to the time that it ceased would inevitably be the person who would have to be assessed. That alternative in the second clause of the sub-section was not dealt with by Rowlatt J. at all,

but he did deal with the third which I now proceed to read: "and where there has been a change of ownership of the trade or business, the Commissioners of Inland Revenue may, if they think fit, take the accounting period as the period ending on the date on which the ownership has so changed and assess the duty on the person who owned or carried on the trade or business or acted as agent for the person carrying on the trade or business at that date." Therefore power is there given to the Commissioners of Inland Revenue to avoid the possible injustice that it is said would be worked by interpreting the opening words as I think they should be interpreted. But the learned judge has construed that last part of the sub-section as to change of ownership of the trade or business as meaning this: "Where there has been a change of ownership of the trade or business during the accounting period." Again, that means reading into the sub-section words which are not there and of which there is no suggestion. The importance of this last part of the sub-section to my mind is this: it looks to me as if the draftsman had in fact seen the possible injustice that might occur if the person carrying on the business at the time of the assessment were assessed for profits which he had not made, but which some one else had made, and therefore he gave the Commissioners power to avoid any such injustice as that by taking the accounting period as ending at the time when the change of ownership took place and assessing the person who was in fact carrying on the business when the profits were earned. I think that what was contemplated, and I do not know that it is unreasonable, was that the Commissioners of Inland Revenue as representing the Crown would, and might be trusted to, exercise that power in a proper case where it ought to be exercised, and that they were not to be looked upon, even when taxing a subject, as going about to seize everything they could irrespective of the injury or injustice which might be thereby done, but might be trusted to exercise the powers given to them properly and reasonably. That to my mind is the real meaning of the sub-section. It means that the

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person to be assessed is the person for the time being—that is, at the time of the assessment—owning or carrying on the business, and not the person who was carrying it on at a past date, and that if in a particular case it be unjust or improper to assess such person the Commissioners have power to obviate that injustice, and that they may be trusted to do so. I think that is the scheme of the sub-section, and perhaps some point is given by the fact that for the purposes of comparison and ascertaining the amount of excess profits duty, no doubt the business is treated as a continuing entity irrespective of changes of ownership. I do not think that is of very great importance, but it does perhaps throw some light upon the matter. Now that, in my opinion, is the proper meaning of this sub-section. The Commissioners may assess the duty, and the only person on whom they can assess it, speaking generally, is the person for the time being owning or carrying on the business, meaning at the time of the assessment, or if the business has ceased, then they may assess it on the person who was immediately carrying it on before it ceased, irrespective of the fact of whether that is the person who has been carrying it on all the time or whether there may not have been other persons besides the person who made the profits who may have been carrying on the business in the meantime, and that where there has been a change of ownership, whether in the accounting period or not, prima facie, the person carrying on the business for the time being at the assessment is the person to be assessed, but that the Commissioners may, if they think fit, instead of assessing him, assess the person who was carrying on the business at the time of the change of ownership, that is to say, the person who was, or at any rate might be, the person who made the profits.

I think it should be observed that the construction of the last clause of the sub-section adopted by Rowlatt J. still leaves a possibility of the very injustice which has been mentioned, for this reason. Even if it meant that there may be a change of ownership of the business during the accounting period, that may be at the very end of the accounting period, and the

person who had obtained the ownership of the business just before the end of the accounting period may be—I do not say *must* be—charged with the whole of the excess profits on the whole of the accounting period. As Rowlatt J. points out, there is in that case no provision in the Act enabling him to obtain any indemnity, and he must obtain it, if he obtains it at all, by some arrangement with the person who preceded him in the ownership of the business. It is possible —I am not at all sure it is the fact—but it is possible that the person who has become the owner of the business, just at the end of what would prima facie be the accounting period, might avoid that result by changing the time at which the accounts are made up—that is change the accounting period, and so only become liable after the time he came in. I am not clear that he could do that, but it is possible he might; but if he did not do that then for the accounting period, the person who is then owning the business and who has not earned the profits is placed in just the same position, though the amount he may have to pay is not so great, as the person is placed by the interpretation which I put upon the opening words of the sub-section, and he has not the protection which I think that person has—the person, I mean, who comes under the opening words of the sub-section. That, in my opinion, is the clear meaning of the sub-section, and that being so I do not think I have any right to read into it any other words, because there may be a possible injustice and hardship imposed by it.

But I cannot help thinking that this hardship is more imaginary than real, and for this reason. Rowlatt J. said that this was the first time this question had been raised. Considering the number of times that businesses must have changed hands by the formation of new companies and possibly in other ways by sale to individuals since this Act was passed, it is very odd, if this were a real danger, that no question has been raised about it up till now. Of course there may be taxpayers who have suffered from it, and suffered in silence. That is rather contrary to the tendency of the present day. Taxpayers do not as a rule suffer in

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silence, but of course they may have done so, and in this particular case, although I quite agree that the facts of a particular case cannot interpret the sub-section, in this particular case it is pretty obvious why the Commissioners should have decided not to exercise the option which they had under the last clause of the sub-section, and for this reason, that if they had it would not on the facts have made one penny difference to the respondents. They had in fact acquired the business, as persons very often do, on the terms of paying all the liabilities of the old business, and therefore it is not they but the old business which would, if it still continued in existence, have been assessed. Then they would have had to recoup the old company under that agreement, and therefore there were very good reasons, apart from the fact that the old company had ceased to exist and could not be assessed, why the Commissioners should not have thought it necessary to resort to the option given to them in the last clause of the sub-section, because it would have made no difference to anybody if they had. That kind of consideration may, and I have very little doubt has influenced the Commissioners in many other cases, and when we look at that fact and also at the fact that no complaint of this kind has ever been made till now, though the Act has been in operation for a long time, I think they show that the injustice is more imaginary than real. I only point that out because I think it well to do so in order to see whether there is such very great force in the argument as to injustice as might at first appear. But whether there is force in that argument or not, in my opinion, as I said, it is no ground for departing from what to my mind is the plain and simple meaning of the words. It seems to me that what was probably in the mind of the framers of this Act was this: We must have a convenient method of collection of the revenue. If a business has changed hands many times and the past owners of it are scattered all over the world, perhaps have parted with their assets, it will be in many cases impossible to collect the revenue. The taxing authorities do not know what the changes of ownership

have been, and therefore, prima facie, they go to the person who is at the time carrying on the business, and then there come the subsequent parts of the sub-section which are put in for the purpose of obviating the injustice or enabling the Commissioners to obviate it to any particular person in a proper case. That to my mind is the scheme of the sub-section and the proper meaning of it.

I wish to mention—I cannot overlook it and I had not done so—the dictum of Lord Finlay in *John Smith & Son* v. *Inland Revenue*. (1) To my mind that case does not bear upon this point at all, nor in my opinion does *Gittus* v. *Inland Revenue Commissioners*. (2) The question in *John Smith & Son* v. *Inland Revenue* (1) was whether a certain sum of 30,000*l*. which the appellant on taking over his father's business under his father's will had to pay for certain profitable coal contracts, was a capital expenditure or was an expenditure for the business which he was entitled to deduct in ascertaining his profits. That was the point in that case, and when it is stated it will at once appear that the question in the present case was not one which, whichever way it was decided, could have determined that case. It is the fact that the four judges in the Scottish Court never mentioned this sub-section at all. It was not, as Lord Finlay points out, alluded to in either of the cases or the appendices. Three of the noble and learned Lords in the House of Lords who gave judgment also made no reference to it. Lord Cave did mention it, but in my opinion he did so in a way which throws little or no light upon the question we have to decide. He mentioned it simply on the point of the business being a continuous business for the purpose of comparison and ascertainment of the amount of the excess profits. I do not think that case is any guide, and certainly the judgments of the majority are, in my opinion, no guide. But there is a strong expression of opinion by Lord Finlay that the construction which Rowlatt J. has put on this sub-section is right and that the one which I put upon it is wrong. I need hardly say that any dictum of Lord Finlay's is one

(1) 58 S. L. R. 313, 316. (2) [1921] 2 A. C. 81.

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which must be considered with the greatest respect, and that the greatest possible weight must be attached to it. But if it be, as I think it was, a dictum pure and simple, and a dictum on a point which did not in any way contribute to the decision of that case, then I am not bound to follow it, and if I differ from it, as with the greatest possible respect I do, then I think I am bound to give my judgment apart from it. I think I had better read what Lord Finlay said. He says this (1): "The contention most pressed at the bar of your Lordships' House on behalf of the Crown was that the excess profits duty is a tax upon the business itself as distinguished from the persons who may from time to time carry it on"; and then he goes on (2): "For a long time the main stress of the argument for the Crown was rested upon s. 45 (2.) of the Excess Profits Duty Act." One cannot doubt that that was the impression left upon Lord Finlay's mind in framing his judgment. It surprised me I must say, because, though I can quite understand it being mentioned, I can hardly understand that the Attorney-General can have laid the main stress of his argument upon a sub-section which practically every judge who decided the case thought had nothing to do with it, and which in my opinion had nothing to do with it in this sense, that in whichever way it was decided it would not have determined that case. Then the noble and learned Lord goes on: "It was contended that the effect of this enactment is that any owner for the time being of a business may be assessed to the excess profits duty although he had nothing to do with the business during the accounting period in which these excess profits were earned. It was insisted that this showed that the taxation was imposed upon the business and not upon the owner. I cannot so read the clause. The excess profits duty is charged not on the business but on the person who carried it on in the relevant accounting period. I cannot consider s. 45 (2.) as empowering the Commissioners to assess to the duty a person who had no interest in the business during the accounting period in respect of which the assessment is made.

(1) 58 S. L. R. 313, 316. (2) Ibid. 317.

The last words of the sub-section providing for a change of ownership are meant to meet the case of a change of ownership in the course of an accounting period "—with respect that seems to me to be writing into the sub-section words which are not there—" and in such a case to enable the Crown to take the accounting period as ending at the date of the change and assess the duty on the person who carried on the business at that date. I agree with the view which is expressed by Rowlatt J. as to the meaning and effect of this clause (s. 45 (2.)) in the case of the *Wankie Colliery Co.* v. *Commissioners of Inland Revenue.* (1) " But then the noble and learned Lord goes on: " The clause is not mentioned in any of the judgments in the Court of Session, and appears to me to have been very properly left out from the pages in the appendix on which are printed the sections which are relevant to the case." It seems to me that the noble and learned Lord took the view which I take, that the determination of the question before us was irrelevant to the matter that was then before the House, and therefore his opinion constitutes a pure and simple dictum. It seems to me that that is the most favourable way in which that opinion of Lord Finlay's can be looked at for the respondents, because if it were a necessary part of the reason for the determination of that case, then it stands in this position, that as it was a dissenting opinion it must be considered that it is destroyed by the decision of the other noble and learned Lords upon that case. In my opinion that is not the position, but if it be the position then not only am I not bound to follow Lord Finlay's opinion, but I am bound not to follow it. But I do not think that is the position. I think the opinion is a dictum purely, a dictum from which I differ with great diffidence, and the more so because it is concurred in by Rowlatt J. and by, I think, Atkin L.J., but from which I do differ for the reasons which I have given.

For these reasons I think the appeal should be allowed and with costs here and below.

(1) [1920] 3 K. B. 287.

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ATKIN L.J. This case arises upon assessments to excess profits duty made against a company which it is not suggested has ever been in receipt of the profits upon which the duty is charged, and the assessments are made in pursuance of the provisions of Part III. of the Finance (No. 2) Act, 1915. It will be necessary to deal perhaps a little more closely with the words of some of the sections in that Part, but the substance is to be found in the first words of sub-s. 1 of s. 38, which is the charging section: "There shall be charged, levied, and paid on the amount by which the profits arising from any trade or business to which this Part of this Act applies, in any accounting period which ended after the fourth day of August, 1914, and before the first day of July, 1915, exceeded, by more than 200*l.*, the pre-war standard of profits as defined for the purposes of this Part of this Act, a duty (in this Act referred to as 'excess profits duty') of an amount equal to fifty per cent. of that excess." Without at the present moment pursuing a closer consideration of the words of the section, the substance of the provision may be stated quite simply. It is this, that a person who made profits during an accounting period in excess of a pre-war standard is to pay 50 per cent. of those excess profits to the Crown.

Now the case for the Crown here is this, that when a business has changed hands a person who has not made profits during the accounting period and had nothing to do with the business at the time at which the profits were made, and may have made a loss while he was concerned with the business, is bound to pay to the Crown half of the profits made by his predecessor, even though those profits remain in the pockets of his predecessor, and he is so bound to pay, and I think this is a most significant fact, and it is admitted in the contentions of the Crown—he is so bound to pay without having any recourse against the person who in fact made the profits and who in fact remains in possession of the whole of the profits, while 50 per cent. of them is being paid by his successor. It sometimes perhaps illustrates a case better to take a concrete example. It means this, that

if a person had made during an accounting period before the Act came into operation, in the year ending June 30, 1915, excess profits to the extent of 50,000*l.*, a purchaser of that business, after that date, who would have bought the goodwill upon the footing that there was that amount of profits being made by the business, and had paid that price, would have to pay to the Crown 25,000*l.*, though he himself may have conducted the business at a loss, and though the vendor from whom he bought the business remained in possession of the whole of the 50,000*l.* profits, and he would have no right of any sort or kind against his vendor under this Act or at common law to recover back that sum of money. He would have no right unless there was some express arrangement made that he should have a right of recourse against the vendor, a right which having regard to the fact that this Act is retrospective, it is extremely unlikely that he would have bargained for.

Now that is the bold contention of the Crown and it appears to me to amount to a suggestion of gross injustice, and to a piece of confiscatory legislation which is without parallel in the history of Parliamentary government in this country, and which, I should think, would exceed the wildest dreams of the most imaginative high prerogative lawyer in the very worst time of our history. Such a conclusion we may be forced to if very plain language is used so as to make it perfectly clear that the Legislature intended to work such injustice. On the other hand we are left a considerable latitude in determining whether the words of the Legislature necessarily drive one to that conclusion. Many authorities could be given, but I prefer to cite the words of Lord Loreburn in *Drummond* v. *Collins*. (1) He is dealing with the Income Tax Acts and the suggested hardship there. He says: "The Income Tax Acts are framed in very general terms. It is necessary so to frame Acts of this kind lest some case manifestly within the purpose of the Legislature may escape the tax. But Courts of law have cut down or even contradicted the language of the Legislature when on a full

(1) [1915] A. C. 1011, 1017.

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view of the Act, considering its scheme and its machinery and the manifest purpose of it, they have thought that a particular case or class of cases was not intended to fall within the taxing clause relied upon by the Crown. A notable instance is the case of *Colquhoun* v. *Brooks* (1) decided nearly thirty years ago, and always followed."

Now to come to the language of this particular statute. The charging section, which is s. 38, seems to me to admit of no doubt whatever as to the intention of the Legislature as to where the charge is to fall: "There shall be charged, levied, and paid on the amount by which the profits arising from any trade or business . . . . exceeded, by more than two hundred pounds, the pre-war standard of profits . . . . a duty . . . . of an amount equal to fifty per cent. of that excess." If that section stood alone I should have imagined there could be no question at all that inasmuch as the duty is charged on the profits the amount is payable by the person who receives the profits, and I think so much has had to be admitted in the argument for the Crown. But it is said there is a section which has been called a machinery section, which makes it clear that, though the charging section imposes a charge upon profits, yet where the business has changed hands the burden of paying the duty may fall upon a person who has never received the profits at all. That section is s. 45, which by sub-s. 2 provides that: "The duty may be assessed on any person for the time being owning or carrying on the trade or business or acting as agent for that person in carrying on the trade or business." That is one limb, and it is said that those words are so plainly only applicable to the person who at the time the assessment is made is carrying on the business that the object and substance of the Act must be ignored, and that the injustice which would be done by making one person pay the tax in respect of moneys which have been received by another must be ignored, and that you can only tax the person who at the time the assessment was made was carrying on the business. And not only that you can only assess him, but

(1) (1889) 14 App. Cas. 493.

that if you wish to get the profits made at any time by another person you must assess him in order to get those profits. It appears to me that those words are capable of being read perfectly reasonably as being applicable to the person who at the appropriate and relevant time in each case and each accounting period, is the person who is chargeable, that is to say, the person who received the profits in respect of each accounting period; and I think that that puts no strain upon the words and avoids the injustice of which I have spoken. But it is said by the Crown that that is not so. The injustice that I have referred to is no doubt perpetrated by those words, but then they say there is a relief from that injustice given by the last limb of the sub-section. They say that there is a discretion given, that for relief you are to trust to the good, kind Commissioners, and that if there is any injustice of that kind then the Commissioners have an option, if they think fit, not to work that injustice. To my mind it has not been the custom of this Realm of England to leave the question whether the subject's property shall be confiscated or not to the discretion of the official tax-gatherer in the confiding hope that he may restrain his predatory instincts, and I should imagine that the commercial world would prefer not to have their heads broken by such precious balms. But one of the answers is that in fact there is no discretion sufficient to avoid this hardship, because if the words of the sub-section are looked at it will appear that the discretion is only a discretion if the Commissioners think fit to take the accounting period as the period ending on the date at which the ownership has so changed; and therefore it has no reference at all except to a change in the actual date of a particular accounting period, and has no reference at all to the case where the accounting period of the previous owner has already terminated before the change of ownership. In that case there is no power at all given to the Commissioners, and it is to be observed, and I think that this is of great importance, in accordance with the view of the Crown there is no other power to charge the previous owner

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at all by the Commissioners if the words in the first limb of the sub-section only apply to the person who is in actual possession of the business at the time that the assessment is made. So that the view of the Crown as far as one can see is this, that not only may you rob the new owner but you must rob him in cases where the profits of the previous owner have been made in an accounting period which had expired before there was a change of ownership. I think it is not irrelevant to consider it in reference to this proposition, that if this view of the rights of the Crown against the new proprietor of a business is right, it would appear that the new proprietor would have no right to set off in respect of the profits which he would be liable to pay in respect of one accounting period the losses made on a subsequent accounting period by the former proprietor for an accounting period which had ended before the change in the proprietorship, though it seems quite plain that by s. 38, sub-s. 3, that right was intended to be given to the person who in fact paid excess profits duty on any one accounting period.

Then it is said that though the words that I have referred to, "any person for the time being," may be doubtful, the whole position is cleared up and the right to rob is made quite plain by the second limb of the sub-section, which provides for what is to happen when a trade or business has ceased, a subject-matter which is of course quite irrelevant to the particular kind of grievance and the particular kind of difficulty that arises in this case, and it is said that that is clear because it provides that the duty may be assessed "where a trade or business has ceased, on the person who owned or carried on the trade or business or acted as agent in carrying on the trade or business immediately before the time at which the trade or business ceased." I take those words as meaning nothing more than a power to define the person who is the owner and the person who ought to be charged when the business ceases, as it may cease, at some period other than the accounting period. You then have to find the person who is chargeable, and it is to be noticed that the words also apply to the case of an agent who is

carrying on the business, an agent who will of course have a right of indemnity against his principal, and I think those words are fully met and fully explained by this fact, amongst others, that when you are dealing with an agent the person you are going to charge is the last agent and the person who is the agent immediately before the business ceases. At any rate I imagine such slight words never had to bear so heavy a burden before as the stress of the whole of this construction put upon the sub-section by the Crown.

Then it has been argued that in fact this contention of the Crown was covered by the decision of the House of Lords in *John Smith & Son* v. *Inland Revenue* (1), and it was said that at any rate the judgment of Lord Cave in that case accepted this view which is put forward by the Crown. I think it is perfectly obvious on reading that judgment that it never entered into Lord Cave's head to affirm this proposition or to come to the conclusion that the Act had this result. The consideration of this sub-section appears to me to have been irrelevant to the reasons given by the majority of the House of Lords in that case. The question was a simple question whether or not these were profits, and that depended upon whether a certain sum of 30,000*l.* was to be brought into account against the profits of the working of the business for a particular year, or whether on the other hand it was in the nature of a sum paid for goodwill. The majority of the House thought that it ought not to be taken into account in estimating the profits and that it was in the nature of a sum paid for goodwill. On the other hand Lord Finlay's judgment does contain an expression of opinion as to the meaning of this sub-section. I agree that in the circumstances of the case it is not only a dictum but a dictum of a noble and learned Lord expressing a dissenting judgment. Of course it is not binding upon us, but it appears to me to be entitled to the greatest weight, and I am very glad to be fortified in my view by the opinion, even though it be only a dictum, of so eminent a lawyer. For my own part I concur with the judgment of Rowlatt J., and I think that the

(1) 58 S. L. R. 313.

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construction put upon this sub-section by the Crown is wrong.

It is said that there cannot be much injustice in this because the case has not come before the Courts before. There is another explanation of that, and that is that the tax-collecting authorities have not been bold enough to bring such a contention before the Courts or to seek to lay such a burden upon the taxpayer. That appears to me to be just as probable an explanation as the explanation that cases have been few in which businesses have exchanged hands since the working of the Excess Profits Duty Act, and that the new proprietor has not been hurt. However, it appears now quite sufficient to say that the hardship is there, and to my mind the result would be an intolerable injustice if this contention of the Crown were supported. I myself do not believe that the Legislature ever intended to work such an injustice. I do not think they have used words which make it clear that they intended to perpetrate such an injustice; on the contrary I think that their words make it plain that they intended the duty to fall upon the person who in fact received the advantage of the excess profits. I think therefore that this appeal should be dismissed.

YOUNGER L.J. The short question raised on this appeal is whether the expression "for the time being" to be found in s. 45, sub-s. 2, of the Finance (No. 2) Act, 1915, in what has been conveniently enough called in argument its first limb, means "during the period of charge" or whether it means "at the date of assessment." I am of opinion that the second is the true meaning of the phrase.

The sub-section is a sub-section with three so-called limbs. The first limb deals with a business—I use the one word throughout in the interests of brevity—continuing at the date of the assessment. The second limb, which is in the alternative and is introduced by the disjunctive "or," deals with a business which at the same date has ceased to be carried on. These two limbs together comprise all possible businesses to which this Part III. of the Act applies. The

third limb introduced by the conjunctive "and" applies, I think, indifferently to businesses included both in the first and in the second limbs, and deals with businesses, whether at the date of assessment they be continuing or whether they then have ceased, but with reference to which there has between the date of assessment and the commencement of the accounting period been a change of ownership—so that in the case of a business included in the first limb of the sub-section its then owner is different from its owner at the commencement of the accounting period; and in the case of a business included in the second limb, the last-mentioned owner is a person different from the owner of the business at the date when it ceased to be carried on.

Now under the second and the third limbs the person to be assessed is, it cannot, I think, be denied, clearly a person chosen by reason of his existence at a point, and not during a period of time. In the case of the second limb he is the person carrying on the business "immediately before the time at which the trade or business ceased"; a phrase which directly connotes that there was a choice between two possible persons as the possible subject of the tax—the one the person carrying on the business *immediately* before the time of cesser, and the other the person carrying it on mediately during the period of charge. The first person is taken as the person to be assessed and the second person is left—a conclusion from the language employed the correctness of which is confirmed, if the word itself were not sufficiently pregnant to carry the result without further assistance, by the third limb introduced by the word "and," which shows, as I think, contrary to what I understood to be Sir John Simon's contention, that a business included in the second limb is equally with one included in the first, a business in respect of which there may have been during the accounting period a change of ownership. And in the case of an assessment under the third limb equally the person to be assessed is one carrying on the business not during any period but at the date of the change of ownership, again, a point of time. Now, as in the case of the second

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limb clearly, and as in the case of the third limb I myself think equally clearly, the person chosen for assessment is chosen by reason of his existence at a point of time, so it seems to me as matter of construction that the same effect ought to be given to the words "for the time being" in the first limb. In that case also the person chosen for assessment is, I think, chosen by reason of his being in existence at a moment of time—namely, at the moment when the duty is assessed by the Commissioners in pursuance of sub-s. 1 of the section. It is not denied that the words are capable of bearing that meaning, and associated as they are, where they occur, with the word "assessed," and with no other idea, it appears to me that grammatically such is the signification which ought to be attributed to them. Moreover, as so construed, these words, while bringing in this respect the first limb of the sub-section into line with the second and the third—and there seems no obvious reason why there should be any variation in this respect between the three—these words, I say, do not, as would be the case if the alternative construction be adopted, make the second limb and possibly also the third limb superfluous, for the reasons already given by my Lord—a very important consideration, as I think. In my judgment therefore the true effect of the whole sub-section is for present purposes this. In the case of a business continuing at the date of the assessment the person to be charged in respect of the whole accounting period is the person carrying it on—I select that comprehensive description again for the sake of brevity—at the date of assessment. In the case of a business which has ceased the person to be charged is the person carrying it on immediately before it ceased. In the case of a business of which during what would otherwise have been the whole accounting period there has been a change of ownership, then, if the Commissioners so think fit, but not otherwise, they may stop the accounting period as at the date of the change and assess to the duty in respect of that abbreviated period the person carrying on the business at the date of the change, the assessment of the new owner in respect of the

subsequent part of the original period of assessment being left to be dealt with either under a fresh assessment, or, in the case of a continuing business, as part of a new accounting period brought into charge under the extension of the Act contemplated in, amongst other places, sub-s. 4 of s. 45. In the last case, however, if the Commissioners do not so think fit then the assessment in respect of that continuing business for the whole accounting period is made upon the person carrying it on at the date of assessment under the first limb; and in the present case that person is the respondent company.

Now it cannot, I think, on the plain words of the sub-section, be successfully contended that in the case of a business which at the date of the assessment had ceased, but which prior to its cesser had changed ownership during its last accounting period—with reference to such a business it cannot, I think, be successfully contended that the person carrying it on immediately before the time at which it ceased is not, under the second limb, assessable, and assessable for the whole accounting period. The words are too strong to admit of any doubt on that point. There is therefore no principle involved in the construction which I feel impelled to place upon the first limb of the sub-section that is not laid down in terms by the very words of the second. And in my view the whole result merely is that the Legislature has provided that there be normally assessed to the duty in each case the owner of the business in being or its last owner, leaving it to him, if by contract with his predecessor he is so entitled, to recover the duty from that predecessor, and if he is not so entitled, leaving him to bear it himself. The present case shows that in some instances at all events this view of this charging sub-section not only works quite fairly, but that if that sub-section be construed as the respondents seek to construe it, no one at all will in some proper cases be assessable to a duty which ought to be borne by them or by persons in their position.

The respondent company here is a reconstruction of a former company of the same name. It has succeeded to all

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the assets of the old company lock stock and barrel with the single reservation of a sum reserved for distribution amongst the members of the old company all of whom in respect of their other interests as shareholders in that company have received the fully paid shares of the respondent company. This is a case therefore in which the excess profits in question have in effect been received either by the respondent company or by its original shareholders. That company, moreover, as is involved in such a transaction almost as a matter of necessity, has undertaken all the debts and liabilities of the old company, amongst which undoubtedly is included this excess profits duty. To assess the respondent company therefore in the present case is merely to leave the liability on the shoulders where by agreement it lies. Of course there is no doubt that legally here there has been a complete transfer from one incorporated company to another and that legal transfer must have full effect. But I think it will not be doubted that while this is so, this also is a case in which the French saying is very true—"plus ça change plus la même chose." There is however no necessity to rely here on any such consideration as that. In the present case the duty, interpreting the sub-section as I do, falls where it should; and that is some justification for the interpretation. If it did not fall there the revenue would, in the circumstances of the present case, lose the duty altogether.

I fully agree, however, as fully as I can express it, that such a result, proper as it is in the present case, ought not to be allowed unduly to influence the true construction of the sub-section. It may, however, properly be referred to if the argument of injustice is relied upon as a justification for attributing to the words of the sub-section that which is not their ordinary meaning. My view is that while it is possible upon the construction I have placed upon the sub-section, that there may be cases in which some real hardship may be caused, still even here I would observe that the tax when it was first imposed by the Act of 1915 was imposed as a retrospective tax. It was a hitherto unforeseen burden wherever it chanced to fall, and what the Legislature

in this sub-section appear to me to have done—a procedure to which I think perhaps the epithets summary and rough and ready may fairly be applied—is that they have thought fit to throw the duty on the owner in being on the footing I have already stated. If that owner, as between himself and his predecessor, ought to bear it, or if he is indemnified by his predecessor he does not suffer. If he is not indemnified and has not agreed, like the respondents, to bear it, then the view of this sub-section as interpreted by myself involves no more than this, that the Legislature conceived that the owner of the continuing business, the continuing fruit-bearing tree, was, in that case, the proper person to be chosen to bear the burden imposed upon that business, even in respect of profits earned before he acquired it—especially if protected, as my Lord has pointed out, he is. I should myself suppose that the cases in which a burden of this kind is not consciously or unconsciously in fact regulated by contract between the transferor and the transferee are relatively few. I should suppose also that those in which as between transferor and transferee, certainly where companies are concerned, any such liability is not assumed by the transferee are extremely rare, and it is a matter of observation, and the consideration to which I have just referred may well account for it, that no case of the injustice arising from this construction of the sub-section to which the Lord Justice so powerfully referred, has up to the present been brought to the notice of the Court. And as no such injustice can in fact arise in respect of any transfer of a business made after the passing of the Act—the parties being then in a position to adjust their relative positions with the statute before them—it is worthy of note that not till nearly six years after the passing of the Act does the case of a transfer of a business made before the Act come before the Court, and when it does it comes at the instance of a company with reference to whose claim for exemption it need only be said that the fairness and the justice of the construction which I have placed upon this sub-section are as applied to them entirely demonstrated by the facts of the case.

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Now, like the Master of the Rolls, I do feel great diffidence in expressing this opinion by reason of the opposite view taken of this sub-section by Lord Finlay in *John Smith & Son* v. *Inland Revenue* (1), but I think it is plain, apart from the reasons requiring this Court to express its own view upon the matter, that Lord Finlay on that occasion had not the advantage of the elaborate arguments with reference to this sub-section which we have heard in this case. The point was in argument only referred to by the company. I conceive that Lord Finlay himself, if he chances to be present in the House of Lords when peradventure an appeal from this decision comes before that tribunal, will consider himself fully at liberty to consider this point again entirely afresh. Accordingly it appears to me that it is our duty to express any conclusion that we may form upon this sub-section after full consideration of the arguments that we have heard, and while I do feel diffidence in expressing that view in face of such a weighty opinion as Lord Finlay's to the contrary, I nevertheless believe it to be my duty to express it as I have done.

One other word I would wish to add. Mr. Hills, in his argument, referred us to s. 35 of the Finance Act, 1918. It is true, I think, to say that to a certain extent that section furnishes legislative approval of the view which I take of this sub-section, but I do not desire unduly to rely upon that approval. On the whole I am of opinion, with the Master of the Rolls, that this appeal should be allowed.

Appeal allowed.

Solicitor for appellants : *The Solicitor of Inland Revenue.*
Solicitors for respondents : *Holmes, Son & Pott.*

(1) 58 S. L. R. 313.

W. I. C.

M. ISAACS AND SONS, LIMITED *v.* WILLIAM McALLUM AND COMPANY, LIMITED.

1921
Feb. 14.

[1919. M. 1561.]

Shipping—Charterparty—Breach by Owner—Sale to Subject of Foreign State—Change of Flag—Damage.

The owner of a chartered ship commits a breach of the charterparty by causing the flag of the ship to be changed during the currency of the charterparty; but whether any and what damage is thereby sustained by the charterer depends upon the circumstances of the particular case.

ACTION in the commercial list tried by Rowlatt J. without a jury.

By a charterparty dated April 15, 1919, the defendants, Messrs. William McAllum & Co., Ld., as owners, chartered to the plaintiffs, Messrs. M. Isaacs & Sons, Ld., the steamship *City of Hamburg*, which at that date was a British ship, for the period of four calendar months. By a second charterparty dated August 30, 1919, the defendants, as owners, further chartered to the plaintiffs the said steamship, which then still continued to be a British ship, for twelve calendar months in direct continuation of the earlier charterparty. The latter charterparty contained an exceptions clause in the usual form, a clause giving the plaintiffs the right to sublet the steamer, and a clause providing that if the steamer was requisitioned by Government the charterparty should be cancelled.

On September 10, 1919, the defendants entered into a contract with one Denis Anghelatos, a Greek subject, by which they sold the steamship to him, the contract containing a clause stating that it was agreed that the defendants should retain the right, notwithstanding the sale, of satisfying any requirement of the charterer as to personal performance of any of the obligations of the charterparty.

The sale was carried out with the permission of the Ministry of Shipping, and the purchaser entered into a bond with the Ministry undertaking to trade for twelve months with the United Kingdom to the satisfaction of the shipping controller.

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On September 11, 1919, the defendants wrote to the plaintiffs giving them notice of the sale subject to the said clause. On the following day the plaintiffs replied that in no circumstances could they consent to transfer of flag during the period of their charterparty, and that they must therefore hold defendants responsible for the due fulfilment of it.

On September 24, 1919, an application on behalf of the plaintiffs for an injunction to restrain the defendants from transferring the steamer from the British flag during the currency of the charterparties was dismissed.

On October 13, 1919, the register of the steamship as a British ship was closed. On November 8, 1919, the steamship was transferred to the Greek flag at Leghorn and renamed the *Panaghios Dracatos*, and on November 12 it left that port under that flag.

The plaintiffs used the steamship during the charterparty notwithstanding the change of flag, and during that period it was almost continuously engaged in voyages.

The plaintiffs thereupon brought the present action against the defendants for alleged breach of the second charterparty. In their statement of claim, delivered on December 1, 1920, the plaintiffs alleged (para. 2) that it was an implied term of the second charterparty that the steamship should remain during that said period of twelve months under the same flag—namely, the British flag—as at the commencement of that period: and that the plaintiffs entered into the second charterparty on the basis of that implied term as the defendants well knew; (para. 3) that further or alternatively it was an implied term of the second charterparty that the defendants would not lessen the beneficial user of the steamship to which the plaintiffs were entitled: (para. 4) that a steamship trading under the British flag was more valuable than a similar steamship trading under the Greek flag by reason of the fact that shippers of general cargo were unwilling to ship such cargo on board Greek ships, and for that reason a Greek steamer could not be profitably employed in regular general cargo lines trading to and from the United Kingdom; and

further that the insurance premiums charged on a Greek ship exceeded by about 50 per cent. the insurance premiums charged on a British ship; and that the defendants were at all material times aware of the facts stated in this paragraph; (para. 5) that in breach of the said implied terms the defendants during the second charterparty sold the steamship to a Greek subject and procured the closing of the register, and the steamship was transferred to the Greek flag and renamed; (para. 6) that by reason of the premises the steamship was delayed at Leghorn from 7 P.M. on November 8 until 8 P.M. on November 12, 1919; (para. 7) that by reason of the change of flag and name the plaintiffs were obliged to pay additional sums for insurance on cargo; (para. 8) that by reason of the change of flag and name the plaintiffs during the remaining period of the second charterparty—namely, December 8, 1919, to October 21, 1920—had suffered damage by reason of increased insurance charges and increased difficulty of getting suitable and remunerative employment for the steamship; (para. 10) that it was necessary for the defendants before selling the steamship to obtain the consent of the Shipping Controller, whose consent was subject to a stipulation that the steamship should trade for twelve months within the United Kingdom only; and (para. 11) that the defendants, by selling the steamship and rendering it subject to that stipulation, cut down the limits within which the steamship was authorized to trade under the charterparty, and thereby committed a breach of the charterparty whereby the plaintiffs alleged that they had suffered certain specified damage; and the plaintiffs claimed under the above sections sums amounting in all to 28,678*l.* 5*s.* 2*d.*

In their defence and counterclaim the defendants stated (para. 2) that they denied the implied term in para. 2 of the statement of claim, and denied that the plaintiffs entered into the charterparty of August 30, 1919, on the basis of that implied term, and that the defendants knew that they so entered into the charterparty; (para. 3) that the defendants denied the implied term alleged in para. 3 of the statement of claim; (para. 4) that the defendants denied that a steamship

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trading under the British flag was more valuable than a similar steamship sailing under the Greek flag; and they denied the facts alleged in para. 4 of the statement of claim, and that the defendants were aware thereof; (para. 5) that the defendants admitted the sale of the steamship, the closing of the British register, and the transference to the Greek flag, but not that the same was in breach of any contract or obligation of the defendants; (para. 6) that the defendants denied: that the steamship was delayed for the period alleged or at all, that the plaintiffs were obliged to pay or did pay additional sums for insurance or increased insurance charges, that the plaintiffs had difficulty in getting suitable or remunerative employment for the steamship, that the matters, damages or loss hereinbefore set out were due to the change of flag or to any breach of contract on the part of the defendants, or to any action of the defendants whereby they were liable to the plaintiffs; (para. 8) that the defendants admitted that the consent of the Ministry of Shipping was necessary to the sale of the steamship, and that it was a condition of the granting of that consent that the steamship should be employed in trading to the United Kingdom for a year; and that the defendants were always ready and willing to perform, and could and would have obtained any licence necessary to perform any voyage within the limits of the charterparty of August 30, 1919; (para. 9) that the defendants denied that they had cut down the limits within which the steamship was authorized or licensed to trade, and denied the damage alleged; and (para. 10) that the damage claimed was denied, and that it was not caused by any act of the defendants or for which they were responsible, and that it was too remote and irrecoverable in law; and by way of counterclaim (paras. 12 and 13) that the defendants claimed certain sums in respect of matters which it is not here material to specify.

In their reply and defence to counterclaim the plaintiffs joined issue except as to admissions, and as to the counterclaim they admitted their liability for a specified sum.

At the trial of the action evidence was called on behalf of

the plaintiffs, in support of the allegations of fact in their statement of claim; and more particularly with a view to showing that after the sale of the steamship her original master and crew were replaced by another master and crew who were less efficient and failed to take proper care of the vessel and her cargo; and that after the sale of the steamer it became more difficult to obtain cargo as the insurance premiums which shippers had at that time to pay on goods shipped on a Greek ship exceeded by about 50 per cent. those payable where the ship was British.

Evidence was called on behalf of the defendants with a view to disproving these allegations.

Leck K.C. and *Jowitt* for the plaintiffs. The defendants committed a breach of the charterparty and are liable to the plaintiffs in damages.

The defendants committed a breach of the charterparty by selling the steamship during the currency of the charterparty to another person without the consent of the plaintiffs. On entering into a charterparty both the shipowner and the charterer become bound to carry out personally the terms of the contract, and, in the absence of any provision in the charterparty enabling him to do so, neither of them has any right without the consent of the other to substitute another person in place of himself: *Dimech* v. *Corlett* (1) and *Omnium D'Enterprises* v. *Sutherland*. (2) The case of *Fratelli Sorrentino* v. *Buerger* (3), where it was held that the shipowners, by selling the ship, had not put it out of their power to perform the contract and could enforce it against the charterers, is distinguishable from the present case, because in that case it was found as a fact that both the original owners and the purchasers were at all times ready and willing to perform personally all the obligations under the contract.

At all events the defendants committed a breach of the charterparty by selling the steamship to the subject of a foreign state and so causing a change in its flag. In the

(1) (1858) 12 Moo. P. C. 199. (2) [1919] 1 K. B. 618.
(3) [1915] 3 K. B. 367.

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absence of any provision to the contrary, there is in a charterparty an implied warranty or condition that the ship's flag will not be changed during the charterparty. This appears to follow from the rule that where the contract of affreightment does not otherwise provide, the law of the ship's flag is that to which the parties submit themselves and which governs the contract for all purposes: *Lloyd* v. *Guibert* (1); per Chitty J. in *In re Missouri S.S. Co.* (2); and Scrutton on Charterparties, 9th ed., p. 20. In a grant of land for a particular purpose there is an implied obligation on the part of the grantor not to derogate from his grant by rendering the land materially less fit for the intended purpose: per Parker J. in *Browne* v. *Flower* (3); and, on the same principle, in a charterparty entered into with reference to a ship of a particular flag, there is an implied obligation on the shipowner not to change the flag. It is, no doubt, true that in a contract of marine insurance there is no implied warranty as to the nationality of the ship, or that her nationality shall not be changed during the risk: Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 37; and see *Dent* v. *Smith* (4); but a contract of insurance differs from a charterparty, inasmuch as it relates only to a risk on the ship and not to the ship itself. In this charterparty, as there was no provision to the contrary, there was an implied term that the flag of the steamship should not be changed. The defendants committed a breach of the contract by selling the steamship to a foreigner, and they would equally have done so if they had retained the property in the vessel and changed their own nationality.

Although the plaintiffs on learning of the breach did not repudiate the contract, they are entitled to damages for any loss which the breach has caused them to suffer. The evidence shows that the breach has caused the plaintiffs to suffer the several kinds of loss mentioned in their points of claim.

Raeburn K.C. and *Porter* for the defendants. The defendants were not prevented by the charterparty from

(1) (1865) L. R. 1 Q. B. 115.
(2) (1889) 42 Ch. D. 321.
(3) [1911] 1 Ch. 219.
(4) (1869) L. R. 4 Q. B. 414.

changing either the ownership or the flag of the steamship. It is not denied that the charterparty bound the defendants to give to the plaintiffs the use of the very steamship to which it related. It did not, however, bind them either to retain the property in the steamship or to maintain its flag. It contained no express provision to that effect. Neither did it contain any implied provision to that effect. There is no authority for the view that in a charterparty merely as such there is any implied warranty or condition that the shipowner will not sell the ship or change its flag. The law will not imply a term in a contract which is not necessary to give efficacy to the contract and which it cannot be presumed that the parties would have included had the matter to which it relates been present to their minds: see *The Moorcock* (1) and *Lazarus* v. *Cairn Line of Steamships*. (2) It is not necessary, as the present case shows, in order to give business efficacy to a charterparty that the chartered vessel should continue in the same ownership or under the same flag. There is no implication in a contract that nothing shall be done by either party which may somewhat increase the hardship or risk of the other: see per Willes J. in *Thompson* v. *Hopper*. (3)

This charterparty contained no express provision from which a term could be implied that the property in or flag of the steamship would not be changed. It did not give any description of the nationality of the steamship. The description of the steamship in the charterparty by an English name, the *City of Hamburg*, did not imply a warranty or representation that it was at the date of the charterparty and would continue to be a British ship: *Clapham* v. *Cologan*. (4) The description of the vessel as being classed A1 applied only to its classification at the date of the charterparty and was not a warranty that it should continue to be so classed: *French* v. *Newgass* (5); and if the sale of the vessel to a foreigner affected its class that was not a breach

(1) (1889) 14 P. D. 64.
(2) (1912) 17 Com. Cas. 107.
(3) (1858) E. B. & E. 1038.
(4) (1813) 3 Camp. 382.
(5) (1878) 3 C. P. D. 163.

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of the charterparty. The clause relating to requisition was not limited to requisition by the British Government.

Under the Marine Insurance Act, 1906 (s. 36), where in a contract of insurance of a ship she is expressly warranted neutral, there is an implied condition of neutrality; but (s. 37) there is in the contract no implied warranty as to her nationality.

In the present case the only question is whether there is an implied term in the charterparty that the ship's flag shall not be changed. The question whether the defendants had a right to sell the ship and assign the charterparty does not arise, and *Fratelli Sorrentino* v. *Buerger* (1) is not applicable.

Leck K.C. replied.

ROWLATT J. [having stated the facts, continued:] The plaintiffs contend that the defendants committed a breach of the charterparty by selling the steamship during the currency of the charterparty. I do not think that the mere fact that the defendants sold the ship during the currency of the charterparty amounted to a breach of the charterparty, especially as the contract of sale contained a clause reserving to the defendants the right to perform personally the obligations of the charterparty.

The plaintiffs, however, say further, that the defendants have committed a breach of the charterparty by selling the steamship during the charterparty to a foreign subject, and so causing a change in her flag. It is not here necessary to inquire whether that action of the defendants would have entitled the plaintiffs to avoid the charterparty. The plaintiffs did not seek to avoid the charterparty. They kept the steamship and continued to avail themselves of her services during the period of the charterparty which has now expired. The charterparty has been performed in the sense that during its currency the steamship has made the various voyages required by the plaintiffs in accordance with the charterparty.

The complaint of the plaintiffs is that there has been a

(1) [1915] 3 K. B. 367.

breach of the charterparty, because the services which have been rendered to them by the steamship have been rendered by a ship not of the British flag but of the Greek flag, and that they have thereby suffered damage.

The case has naturally given rise to some discussion as to the terms which are to be implied in a contract of this kind.

It is clear that the fact that in this charterparty the steamship was described by an English name, the *City of Hamburg*, did not imply any warranty that it was, or would continue to be, a British ship: see *Clapham* v. *Cologan* (1), and no claim could be made by the plaintiffs on that ground.

It is said, however, by counsel for the plaintiffs, and it seems to me that they are right in saying so, that where persons enter into a contract for services to be rendered by one of them to the other by means of a specific chattel, there is an implied term in the contract by which the person supplying the chattel undertakes that it shall not be altered so as materially to prejudice the services which are to be rendered by it; and that if it is so altered there is a breach of that term. If a person enters into a contract for the use of a specific thing he does not get what he contracts for if the thing is so altered as to render him services substantially less valuable than, or different from, those contracted for. This is only a special phase of the principle of *Appleby* v. *Myers* (2), which lies at the root of the doctrine of implied terms in its application to cases of this kind.

I therefore think that the question here is whether the defendants by selling the steamship to a Greek subject and so causing her flag to be changed from the British to the Greek flag made such an alteration in her as has materially affected the services which she was to render to the plaintiff under the charterparty. The plaintiffs contend that the defendants by so doing gave them the services of a ship different from and less valuable than that for which they had contracted; and the defendants deny this. Many changes can, no doubt, be made in a chartered ship which do not materially affect her position

(1) 3 Camp. 382. (2) (1867) L. R. 2 C. P. 651.

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under the charterparty—such, for example, as altering her colour, or her masts. I have here to consider whether a change in the ship's flag is such a change as materially to affect the ship as the subject-matter of the charterparty. I think I must deal with the question generally and without drawing any distinction between different nationalities. I do not think that I can treat the question of a change of flag from the British to the French flag, for example, as distinct for this purpose from a change from the British to the Chinese flag or to the flag of some undeveloped power. That distinction is relevant to the question of damages, but not to the question of breach. I have to face the plain question whether a change in the flag of the chartered ship is a breach of the charterparty as being a material change in the nature of the subject-matter. It seems to me that it is. I do not think it could possibly be held that it makes no difference under what flag a ship sails. The law of the flag is of direct importance as affecting the status of the ship. It is also of importance in its collateral effects, as, for instance, in determining the nationality and therefore to some extent the discipline and morals of the crew and in many other respects. It seems to me that in any particular case of this kind there can be no question that the change of flag is a breach of the charterparty, and that the only question is what damages, if any, have resulted from the change of flag. I must therefore hold that it was a breach of this charterparty to change the flag of the steamer during the charterparty.

As to damages, these must depend upon the circumstances of the particular case. I cannot conceive that the transfer of a ship from the flag of a civilized power to that of a wholly uncivilized power would not give rise to damages. Greece, however, is a civilized power and a maritime nation of good standing, and I do not think that the damages in this case can possibly be heavy. [His Lordship considered the several heads of damage set forth by the plaintiffs in the statement of claim, and came to the conclusion that the only one of these under which they were entitled to damages was that specified in para. 8—namely, the increased difficulty of getting suitable

and remunerative employment for the steamship.] I give judgment for the plaintiffs, and I direct an inquiry before a referee as to the damages resulting to them from the difficulty of getting suitable and remunerative employment for the ship; and I give judgment for the defendants for the amount admittedly due to them under their counterclaim.

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Judgment accordingly.

Solicitors for plaintiffs: *Lowless & Co.*

Solicitors for defendants: *Downing, Handcock, Middleton & Lewis.*

J. R.

[IN THE COURT OF APPEAL.]

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April 15, 19.

NIBLETT, LIMITED *v.* CONFECTIONERS' MATERIALS COMPANY, LIMITED.

[1920. N. 744.]

Sale of Goods—Infringement of Trade Mark—Implied Condition—Warranty—Right to sell—Quiet Possession—Merchantable Quality—Goods of several Brands—Vendor's Option—Circumstance negativing implied Warranty—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *ss.* 12, 14.

By s. 12 of the Sale of Goods Act, 1893, "In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

(1.) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass:

(2.) An implied warranty that the buyer shall have and enjoy quiet possession of the goods. . . . ."

By s. 14: "Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—

(2.) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality. . . . ."

A firm who dealt in confectioners' materials agreed in writing to sell

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condensed milk in tins and of a certain standard at a price including insurance and freight from New York to London. Payment was to be made in cash on receipt of the shipping documents. The buyers received the documents and paid the price. The goods arrived bearing a name or brand which was an infringement of the registered trade mark of certain manufacturers of condensed milk, at whose instance the Commissioners of Customs detained the goods. The buyers were obliged to remove the name or brand in order to get possession of the goods and could only sell them at a loss without any distinctive mark. In an action by the buyers against the sellers for breach of warranty:—

Held, by Bankes, Scrutton and Atkin L.JJ., that the defendants had broken the implied condition in s. 12, sub-s. 1, of the Act that they had a right to sell the goods.

By Bankes and Atkin L.JJ.: That they had broken the implied condition in s. 14, sub-s. 2, that the goods should be of merchantable quality.

By Atkin L.J.: That they had also broken the implied warranty in s. 12, sub-s. 2, that the buyers should have and enjoy quiet possession of the goods.

The defendants alleged that the contract of sale was an oral contract and that one of its terms was that they might deliver milk of several brands, one of which was the infringing brand.

Held, per Curiam, that assuming this to be a term of the contract it was not a circumstance showing a different intention so as to negative the implied condition and warranty in s. 12.

Monforts v. *Marsden* (1895) 12 R. P. C. 266 disapproved.

Judgment of Bailhache J. reversed.

APPEAL from the judgment of Bailhache J. in an action tried before the learned judge without a jury.

The plaintiffs and the defendants were merchants in the City of London. The plaintiffs brought this action for breaches of condition or warranty on a sale to them by the defendants on August 18, 1919, of 1000 cases of condensed milk. The contract of sale was dated August 18, 1919, and signed by the defendants, and was in the following form: "We confirm having sold to you this day the following goods, viz: . . . . . About 3000 cases of sweetened full cream condensed 1919 season's milk, quality equal to federal standard; cases containing 48 14 oz. nett tins; shipment during the months of August $\frac{\text{and}}{\text{or}}$ September, 1919, from New York at 42*s.* per case cost, insurance, and freight London; nett cash against documents; 10 per cent. examination for pierced $\frac{\text{and}}{\text{or}}$ blown tins." On the same day a bought note was signed by the plaintiffs, "We confirm having bought of you

this day the following goods "—the document continued in the same words as the sold note.

The plaintiffs in their statement of claim alleged that the contract was a verbal contract subsequently confirmed by the defendants in a letter dated August 18; and the defendants in their defence alleged that it was a term of the oral contract mentioned in the statement of claim that the tins of condensed milk should be of one or more of the following brands—namely, "Freedom," "Tuscan," or "Nissly"; and that at the time of entering into the contract the plaintiffs knew that the milk was coming from the United States and would be of those three brands or some or one of them, and expected that it would be of the "Nissly" brand.

The defendants delivered 2000 cases of the "Freedom" brand. These cases were accepted and paid for by the plaintiffs, and no question arose concerning them.

The remaining 1000 cases arrived on board a vessel named the *Independence*. The shipping documents did not disclose the brand of these goods. When the documents were tendered the plaintiffs accepted them and paid for them on September 29, 1919. The 1000 cases contained tins of the "Nissly" brand and no others. On November 6 the plaintiffs received the following letter from the defendants: "It has just come to our knowledge that Messrs. Nestlé"—Nestlé and Anglo-Swiss Condensed Milk Co., Ld.—"have raised an objection in a case where a man in Manchester sold 'Nissly' brand milk, the objection being that 'Nissly' was a colourable imitation of their trade mark. Whether they are right or wrong we are not prepared to say, neither would we care to fight an undertaking like Messrs. Nestlé. . . . . We are merely giving you this information, and would ask you in your own interest not to offer the milk for sale for the moment. . . . ."

On November 13, 1919, the Nestlé & Anglo-Swiss Co. wrote to the defendants complaining that they had imported and disposed of a large quantity of condensed milk bearing a label with the words "Nissly Brand," which was an infringement of their trade mark rights, and threatening proceedings unless a satisfactory offer of amends were made. On

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November 28 the defendants signed an undertaking not to sell, advertise, or offer for sale nor to dispose of any condensed milk under the title of "Nissly" or any other name so as to represent or lead to the belief that it was the milk manufactured by the Nestlé & Anglo-Swiss Co.

On December 12 the plaintiffs wrote to the defendants to say that the 1000 cases with the "Nissly" brand were unsaleable and asking them to take these cases back and let them have other cases of a saleable brand in exchange. On the same day the defendants replied that this was impossible. The plaintiffs then made repeated applications for a licence to export the 1000 cases. On March 11, 1920, they received the following letter from the Board of Trade: "Before your application for an export licence can be considered it will be necessary for you either to satisfy this department that the proposed export is not a breach of the injunction obtained by the Nestlé and Anglo-Swiss Condensed Milk Co. or to produce the written consent of the Nestlé and Anglo-Swiss Condensed Milk Co. to the proposed export." On May 21 the goods were being detained at Tilbury Docks by the Commissioners of Customs and Excise. (1) The plaintiffs applied to the Commissioners for a release of the goods. On May 26 the Commissioners wrote to say that the goods were detained because they bore labels with marks which were regarded as an infringement of the registered trade mark "Nestlé's" of the Nestlé and Anglo-Swiss Condensed Milk Co., but that the Commissioners would be prepared to deal favourably with the application for release of the milk on destruction of the infringing labels provided a statement were obtained from Messrs. Nestlé that they would then waive their objection to the importation of the goods. The plaintiffs thereupon destroyed the labels, and after procuring the assent of Messrs. Nestlé obtained the goods from the Customs House and sold them unlabelled for the best price they could get.

The plaintiffs claimed damages for breach of warranties (1.) that the milk was of merchantable quality; (2.) that

(1) Presumably under s. 16 of the Merchandise Marks Act, 1887.

the defendants had a right to sell it; (3.) that the plaintiffs should have and enjoy quiet possession of it. They also alleged that it was an implied condition or warranty of the contract that any milk delivered thereunder should not by its mark, label, or name be an infringement of any trade mark or name of any brand of condensed milk already being dealt with on the market, or a colourable imitation of any such brand. They insisted that the mark or name "Nissly" on the 1000 cases resembled the mark or name on the tins of condensed milk sold by the Nestlé and Anglo-Swiss Condensed Milk Co., and that any sale or dealing with the 1000 cases was an infringement of that company's rights.

Bailhache J., on the authority of *Monforts* v. *Marsden* (1), gave judgment for the defendants, but he assessed the plaintiffs' damages, in case the Court of Appeal should hold otherwise, at 400*l*.

The plaintiffs appealed.

Stuart Bevan K.C. and *J. Dickinson* for the appellants. On general principles it would seem clear that a person who can be restrained by injunction from selling certain goods has not the right to sell those goods; and equally clear that a purchaser cannot have and enjoy quiet possession of the goods if he can only get possession of them at the trouble and expense of defacing them. If this is so the respondents have committed breaches of the condition in s. 12, sub-s. 1, and the warranty in s. 1, sub-s. 2, of the Sale of Goods Act, 1893. Furthermore, no reasonable man would in the circumstances of this case accept these goods in performance of an offer by him to buy sweetened condensed milk. That is the test of merchantable quality laid down by Farwell L.J. in *Bristol Tramways Co.* v. *Fiat Motors.* (2) It follows that the respondents have also failed to perform the implied condition in s. 14, sub-s. 2, that the goods should be of merchantable quality. Bailhache J. would have decided in favour of the appellants if he had not felt himself bound by

(1) 12 R. P. C. 266.

(2) [1910] 2 K. B. 831, 841.

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Monforts v. *Marsden*. (1) That case was wrongly decided and ought to be overruled.

Kerly K.C. and *E. F. Spence* for the respondents. This was an oral contract, pleaded and treated at the trial as an oral contract and shown to be an oral contract by the documents of August 18, 1919, which purport to confirm it. It was a term of this contract that milk of the "Freedom," "Tuscan" or "Nissly" brand might be delivered in performance of the seller's promise. This was a circumstance of the contract showing an intention to exclude a condition that the sellers should have a right to sell, or that the buyers should have quiet possession. If the contract were for the sale of milk of the "Nissly" brand the sellers must deliver milk of that brand or pay damages. They could not refuse to deliver on the ground that their contract was an infringement of the rights of third parties. If buyers purchase goods of a particular brand they buy them with all faults. They do not buy with the goods a warranty or condition that the brand infringes no trade mark. This contract was in effect a contract for milk of the "Nissly" brand, inasmuch as milk of that brand might have been delivered in fulfilment of the sellers' obligation.

Secondly, if the contract was in writing and contained no reference to any particular brand, Bailhache J. came to the right conclusion in following *Monforts* v. *Marsden* (1), which is good law and ought to be affirmed. It was never intended by s. 12 of the Sale of Goods Act that a seller should warrant a title higher than that of the owner of the goods. He only warrants that the purchaser shall have such a property in the goods as can be transferred by virtue of ownership, that is by the owner himself or by one who sells by the authority of the owner. A new and a heavy burden will be imposed upon sellers if they must warrant not only that they have the rights of ownership, but also that the goods they sell are not an infringement of some one's trade mark.

The implied condition in s. 14, sub-s. 2, that the goods shall be of merchantable quality, relates to the quality or

(1) 12 R. P. C. 266.

fitness of the goods themselves. It has never been invoked to protect the buyer from claims by third persons.

Stuart Bevan K.C. in reply. The contract if originally oral was reduced into writing, and its terms must be gathered from the written documents. But even if the respondents had an option to deliver goods of three brands they were bound to deliver goods in accordance with the implied condition and warranty in s. 12. The alleged option is not a circumstance of the contract such as to show a different intention within the meaning of that section.

BANKES L.J. In this case the buyers seek to recover damages from the sellers on the ground that the goods delivered were not in accordance with the contract of sale. The case as presented to us rests on one or another of three enactments. It is said that the buyers had a right of action under s. 12 or under s. 14 of the Sale of Goods Act, 1893, or under s. 17 of the Merchandise Marks Act, 1887. Upon this last alternative I need say nothing. No reference was made to it at the trial. If it had been insisted on it would have required evidence which the respondents had no opportunity of giving in the Court below, and the appellants ought not to be allowed to make that point now. I therefore confine myself to the claims under s. 12 and s. 14 of the Sale of Goods Act, 1893, though it does not appear that s. 14 was much relied on by counsel or considered by the judge at the trial.

In August, 1919, the parties entered into a contract for the sale of 3000 cases of condensed milk. The contract was originally made at an interview, but it was subsequently confirmed by writing in the form of a sold note dated August 18 sent by the respondents to the appellants with a request that they would sign a counterpart, that is to say, a bought note, in the same terms, which the appellants did. The contract appears to be wholly embodied in the writing. Notwithstanding this both parties seem to have treated the contract as partly oral and partly in writing, and to have adduced parol evidence as to its terms, and counsel for the respondents have contended that it was agreed that one or more of three

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brands of condensed milk, including the "Nissly" brand, might be delivered in fulfilment of the contract, and Bailhache J. appears to have dealt with the case on that footing. Two thousand cases were delivered, and give rise to no question. One thousand arrived bearing labels with the word "Nissly" upon them. It came to the knowledge of the Nestlé and Anglo-Swiss Co. that parcels of condensed milk were being imported with this label upon them, and they took up the position that these 1000 cases infringed their registered trade mark. They objected to these goods being dealt with in any way. The justice of their objection was admitted by the respondents, who gave an undertaking not to sell, offer for sale, or dispose of any condensed milk under the title of "Nissly." The appellants did their best to sell, exchange, or export the goods, but found that the only possible way of dealing with them was to strip them of their labels and sell them without marks or labels.

Bailhache J. came to the clear conclusion that if s. 12 of the Sale of Goods Act, 1893, is to be construed literally the respondents had no right to sell the goods as they were, and that the appellants were not enjoying and never had enjoyed quiet possession of the goods; that they could never get them from the Commissioners of Customs, and that if they had got them they were never in a position to deal with them, because of the Nestlé Co.'s threat. But he felt himself bound by the judgment of Lord Russell C.J. in *Monforts* v. *Marsden* (1) to give to s. 12 a meaning and effect which he would not have attributed to it but for that case. With the greatest respect to Lord Russell C.J. I think the doubts cast by Bailhache J. upon that decision are justified. The case was heard and decided by Lord Russell C.J. on circuit. He took the view that s. 12 was to be read with qualifications like those which limit the implied covenant for quiet enjoyment in a conveyance of real property by a grantor who conveys as beneficial owner under s. 7 of the Conveyancing Act, 1881, and he imposed upon the implied obligations in s. 12 of the Sale of Goods Act, 1893, a restriction limiting

(1) 12 R. P. C. 266.

their operation to acts and omissions of the vendor and those acting by his authority. I cannot agree with the view thus expressed by Lord Russell. I think s. 12 has a much wider effect, and that the language does not warrant the limitation imposed by Lord Russell. I express no opinion as to what "circumstances" of a contract are "such as to show a different intention," to use the earlier words of s. 12. Mr. Spence contended that these circumstances are not confined to matters relating to the making of the contract, but would include the fact that at the time of making a written contract for the sale of goods it was understood that the goods would be of one or another brand. He argued that this was a circumstance which would show an intention to exclude the warranties otherwise implied. But assuming that goods of one or more of three brands might be delivered under the contract, that circumstance does not show any intention that if two of those brands are free from objection, and the third is an infringement of trade mark rights, the vendor may tender goods of the third brand in fulfilment of his contract. The goods tendered must still be goods which the vendor has a right to sell. Therefore in my opinion the appellants have established a right of action under s. 12, sub-s. 1, of the Act.

It is not necessary to consider whether there is also a good cause of action under s. 12, sub-s. 2, and I say nothing upon that point. I think there is also a cause of action under s. 14, sub-s. 2, because these goods were not "of merchantable quality." Quality includes the state or condition of the goods. The state of this condensed milk was that it was packed in tins bearing labels. The labels were as much part of the state or condition of the goods as the tins were. The state of the packing affected the merchantable quality of the goods. In *Bristol Tramways Co.* v. *Fiat Motors* (1) Farwell L.J. said: "The phrase 'merchantable quality' seems more appropriate to a retail purchaser buying from a wholesale firm than to private buyers, and to natural products, such as grain, wool, or flour, than to a complicated

(1) [1910] 2 K. B. 831, 840.

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machine, but it is clear that it extends to both: the definition of 'goods' in s. 62 makes that word include 'all chattels personal other than things in action and money,' and 'quality of goods' includes their state or condition. And this is in accordance with the older cases, e.g., in *Laing* v. *Fidgeon* (1), where it was held that in every contract to furnish manufactured goods, however low the price, it is an implied term that the goods shall be merchantable. In *Gardiner* v. *Gray* (2) Lord Ellenborough says: 'The intention of both parties must be taken to be that it shall be saleable in the market under the denomination mentioned in the contract between them; the purchaser cannot be supposed to buy goods to lay them on a dunghill.' The phrase in s. 14, sub-s. 2, is, in my opinion, used as meaning that the article is of such quality and in such condition that a reasonable man acting reasonably would after a full examination accept it under the circumstances of the case in performance of his offer to buy that article whether he buys it for his own use or to sell again." If the warranty that the goods shall be of merchantable quality applies to a complicated machine it applies equally to the packing in which the goods are presented which may, and does in this case, form a most important feature of the goods as delivered. Mr. Kerly contended that there was no evidence that the goods were bought from a seller who dealt in goods of that description. I cannot agree. In my view there was ample evidence which called for an answer, if answer there were. Therefore if it were necessary to decide this point I should hold that the appellants had a cause of action under s. 14, sub-s. 2. The appeal must be allowed and judgment will be entered for the appellant for 400*l.*

SCRUTTON L.J. Several difficult questions have been raised on this appeal, and if it were necessary to decide them all I should desire further time to consider them. Upon some of the points raised I am not sure that I should agree with my learned brothers; but I agree in the result for the following

(1) (1815) 6 Taunt. 108. (2) (1815) 4 Camp. 144, 145.

reasons. This was an English contract in writing whereby the appellants bought 3000 cases of sweetened full cream condensed 1919 season's milk of a quality equal to federal standard. The milk came from the United States. The price was 42*s.* a case c.i.f. London nett cash against documents. The documents which were tendered under this contract had reference to certain cases which had on them labels with the words "Nissly Brand." The Nestlé and Anglo-Swiss Condensed Milk Co. considered that the word "Nissly" was an infringement of their registered trade mark, and that they could stop the sale of these goods. They attacked the sellers, and the sellers not wishing to try conclusions with so redoubtable an opponent admitted that the cases were an infringement of the Nestlé Company's trade mark and undertook not to sell condensed milk under the title of "Nissly." Neither were the buyers prepared to fight the Nestlé Company; and after an unsuccessful attempt to export these cases they were driven to remove the labels and sell the goods as condensed milk unlabelled. They then sued the sellers, and Bailhache J., though he felt bound to enter judgment for the sellers, has assessed the buyers' damages at 400*l.*

In this Court the buyers attempted to make out a case under s. 17 of the Merchandise Marks Act, 1887; indeed the sellers seemed to think this the most formidable line of attack against them; but that case was not made in the Court below; to enable us to decide it we should want to know more about the word or name "Nissly," who put the labels on the tins, and what marks if any they had on them originally. A point which requires evidence for its decision should not be taken for the first time in the Court of Appeal. Therefore I shut out the claim under the Merchandise Marks Act, 1887.

The second point arose on s. 12, sub-s. 1, of the Sale of Goods Act, which provides that there is an implied condition on the part of the seller that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass. The property was to pass when the documents were tendered for the cases containing the goods.

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The respondents impliedly warranted that they had then a right to sell them. In fact they could have been restrained by injunction from selling them, because they were infringing the rights of third persons. If a vendor can be stopped by process of law from selling he has not the right to sell. Therefore the purchasers so far have made out a cause of action for breach of s. 12, sub-s. 1. This is to apply unless the circumstances of the contract are such as to show a different intention. Here we are in a difficulty, because the matter with which we have to deal is uncertain. The sellers say that the contract was oral and that the goods might be of one or more of three named brands. It seems to me that in a contract to sell goods of specified brands there might be circumstances showing an intention that the seller should not warrant his right to sell. If, for example, this contract had been to sell 1000 cases of the "Nissly" brand, would the sellers then have warranted that they had a right to sell? I desire to reserve my opinion on that question. But assuming that the sellers establish that they had an option to deliver goods of the "Tuscan," "Freedom," or "Nissly" brands, they could have fulfilled their contract lawfully in two ways; if they had chosen the third way they could have been stopped. I cannot infer from these circumstances an intention that they should not warrant their title to sell.

Upon the question whether there was an implied condition that the buyers should have and enjoy quiet possession of the goods I desire to give no decision. In *Jones* v. *Consolidated Anthracite Collieries* (1) I was able to avoid defining the limits of a covenant for quiet enjoyment; fortunately, because, as I said, the conflicting authorities made the covenant difficult to construe. I say no more now.

I have not been able to trace the origin or history of the condition that goods shall be of merchantable quality. If I had to express my present opinion it is that the condition does not touch the title to the goods or the right to sell them. I base my decision upon the implied condition in s. 12, sub-s. 1, that the respondents had a right to sell the goods; that there

(1) [1916] 1 K. B. 123, 136, 137.

were no circumstances in the contract to show a different intention, and that they failed to perform that condition.

It remains to consider *Monforts* v. *Marsden*. (1) Lord Russell C.J. was among the great lawyers who have sat upon the English Bench, and I look upon any decision of his with great respect. He observed that s. 12, sub-s. 1, though it provides for an implied condition that the vendor has a right to sell, makes no mention of any condition or warranty that the purchaser shall be able legally to use the thing sold. He further drew attention to the uncertain validity of letters patent, upon which each appellate Court may differ from the Court below. These considerations enabled him to arrive at the decision that the vendor of a patented machine for preparing cloth did not warrant that the patent was valid or that the purchaser should be legally entitled to work the machine. The learned Chief Justice assumed that the vendor had the right to sell the machine. He did not consider whether he might have been stopped from selling it. If he had considered that point he must have seen the difficulty in the way of holding that a vendor has a right to sell goods which he may be restrained from selling. There is much to be said for the view of Bailhache J. that the circumstances of the contract in *Monforts* v. *Marsden* (1) were such as to negative the implied condition that the vendor had a right to sell the machine; but in so far as it decides that the vendor had fulfilled the condition, I think the decision is erroneous and ought to be overruled.

ATKIN L.J. This was an action for breach of warranty on the sale of goods. The first question is, What was the contract between the parties? In my opinion it was contained in the two documents dated August 18, 1919. Every essential term of the contract is recorded in those documents. The respondents however suggest that though the documents speak of 3000 cases there was a term not expressed in writing that the milk to be supplied should be milk of three named brands and that the vendors might at their option deliver

(1) 12 R. P. C. 266.

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milk of the "Tuscan," "Freedom," or "Nissly" brand. In my view this suggestion is inadmissible, because the parties intended to embody the whole contract in writing, and this suggested term is inconsistent with the writing; or, if it is sought to introduce it as a collateral term I should like to refer to the words of Lord Moulton in *Heilbut* v. *Buckleton* (1), the last and most authoritative statement on this matter of collateral contracts: "It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. 'If you will make such and such a contract I will give you one hundred pounds,' is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract. But such collateral contracts must from their very nature be rare. The effect of a collateral contract such as that which I have instanced would be to increase the consideration of the main contract by 100*l.*, and the more natural and usual way of carrying this out would be by so modifying the main contract and not by executing a concurrent and collateral contract. Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties to them must be clearly shown. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject matter." To one who bears those words in mind it is evident that a suggestion made while the parties were discussing the terms of this contract, that the milk supplied would be of three brands, is not to be regarded as a

(1) [1913] A. C. 30, 47.

collateral term of the contract. Therefore I approach this case with the view that the contract was simply and solely that contained in the documents. The goods were delivered in two instalments: 2000 cases of the "Freedom" brand, which give rise to no difficulty; and 1000 of the "Nissly" brand. Of these it is enough to say that they were an infringement of the Nestlé Company's trade mark. The infringement was admitted, and the respondents gave an undertaking not to sell any condensed milk under the title of "Nissly"; and there is no doubt that the appellants, if they had sold these goods as delivered, would have been liable to an injunction in the terms of the undertaking given by the respondents. Before this undertaking was given the respondents wrote to the appellants saying that the Nestlé Company were objecting to this brand and asking the appellants not to offer the milk for sale for the moment. In the end the appellants were obliged to remove the labels before they were able to sell the goods they had bought from the respondents. That was the state or condition of the goods delivered under this contract.

In a contract for the sale of goods there is an implied condition that the seller has a right to sell the goods "unless the circumstances of the contract are such as to show a different intention." I think those words were inserted in s. 12 of the Sale of Goods Act to exclude sales by a sheriff under an execution and other cases where by implication or by express terms there is no warranty of title. In the present case I see no circumstances "such as to show a different intention," and therefore I think there was an implied condition that the sellers had a right to sell the goods. The sellers had not the right to sell these goods. They gave an undertaking not to sell them, and having admitted that they were an infringement of the Nestlé Company's trade mark they were liable to an injunction restraining the sale. Therefore they had no right to sell these goods at the time when the property was to pass. It may be that the implied condition is not broken if the seller is able to pass to the purchaser a right to sell notwithstanding his own inability;

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but that is not so here, for the Nestlé Company had the same rights against the appellants as they had against the respondents. In my opinion there was a breach of this condition. The only doubt in my mind is raised by the judgment of Lord Russell C.J. in *Monforts* v. *Marsden*. (1) That was not a decision expressly under s. 12 of the Sale of Goods Act, 1893, because the sale took place before that Act was passed; but the Lord Chief Justice treated the Act as declaring the law at the date of the sale. He said: "I think that all that the first implied condition as to title meant was that the man had a right to sell the thing as it was in the sense of being able to pass the property in the thing to the vendee, and in the sense that nobody had a title superior to that of the vendor, so that the possession of the vendee might be disturbed. . . . . " The Lord Chief Justice is using the right to sell in two different senses. The right to pass the property is one thing, and no doubt the respondents could have passed the property in the milk but for the intervention of the Nestlé Company; but the existence of a title superior to that of the vendor, so that the possession of the vendee may be disturbed, is another thing; and there was a title superior to that of the vendor, so that the possession of the vendee could be disturbed, unless title means no more than ability to pass the property, in which case it does not exhaust all the contingencies whereby the possession of the vendee can be disturbed. The owners of the patent had no right or ability to pass the property, but they had a right to disturb the possession of the defendant in that case. The Lord Chief Justice continued: "In other words, it is a warranty of good title to the thing; it is not a covenant as to the quality of the thing, as to the workability of the thing, or that the machine shall be delivered under circumstances in which the vendee should be entitled to work it." With all respect, this is to apply to a code a wrong canon of construction. The true canon is to give full effect to the words enacted, not to read those words by the light of existing decisions and infer from the absence of authority an intention

(1) 12 R. P. C. 266, 269.

not to amend the law. Whatever the law may have been before the passing of the Sale of Goods Act, there is since that Act an implied condition that the sellers shall have a right to sell the goods at the time when the property is to pass. As they had not that right there was a breach of this condition.

I think there was also a breach of the implied warranty in sub-s. 2, that the buyer shall have and enjoy quiet possession of the goods. It may be that possession would not be disturbed if the only cause of complaint was that the buyer could not dispose of the goods, and that the warranty is confined to disturbance of possession of the goods delivered under the contract of sale. The warranty so interpreted was broken. The appellants were never allowed to have quiet possession. They had to strip off the labels before they could assume possession of the goods. Probably this warranty resembles the covenant for quiet enjoyment of real property by a vendor who conveys as beneficial owner in being subject to certain limitations, and only purports to protect the purchaser against lawful acts of third persons and against breaches of the contract of sale and tortious acts of the vendor himself. But it is unnecessary to define its scope. There was a clear breach in the present case.

In considering the implied warranty in s. 14, sub-s. 2, the first question is whether the respondents were sellers who deal in goods of the description of the goods bought. Upon this the facts do not admit of a doubt. They describe themselves as the Confectioners' Materials Co., Ld. The correspondence shows that they have entered into contracts with other purchasers for similar goods. Beyond all doubt they deal in goods of this description. Then were the goods of merchantable quality? Applying the passage read by Bankes L.J. from *Bristol Tramways Co.* v. *Fiat Motors* (1) it seems to me that these goods were in such a state or condition that no reasonable man would in the circumstances accept them in performance of an offer to buy sweetened full cream condensed milk. If he knew the real facts he would refuse

(1) [1910] 2 K. B. 831, 840.

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the goods on the ground that they were in such a state or condition as to expose him to an injunction. No one who knew the facts would buy them in that state or condition; in other words they were unsaleable and unmerchantable.

The judgment must be set aside and judgment must be entered for the appellants. In coming to this conclusion we are deciding as Bailhache J. would have decided if he had not felt himself bound by *Monforts* v. *Marsden*. (1)

I agree that the argument upon s. 17 of the Merchandise Marks Act, 1887, is not open to the appellants.

Appeal allowed.

Solicitors for appellants: *William A. Crump & Son.*
Solicitors for respondents: *Maxwell & Co.*

W. H. G.

Considered. MINNS *v.* MOORE [1950] 1 K. B. 241

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[IN THE COURT OF APPEAL.]

REMMINGTON *v.* LARCHIN.

Emergency Legislation—Landlord and Tenant—Restriction on Premiums—Premium paid to Tenant to surrender Tenancy—Premium paid by new Tenant—Recovery Back—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 8.

By s. 8, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, "A person shall not, as a condition of the grant, renewal, or continuance of a tenancy or sub-tenancy of any dwelling-house to which this Act applies, require the payment of any fine, premium, or other like sum, or the giving of any pecuniary consideration, in addition to the rent, and where any such payment or consideration has been made or given in respect of any such dwelling-house under an agreement made after the 25th day of March, 1920, the amount or value thereof shall be recoverable by the person by whom it was made or given. . . . ." By sub-s. 2: "A person requiring any payment or the giving of any consideration in contravention of this section shall be liable on summary conviction to a fine not exceeding 100*l*. . . . ." Sect. 8 is in a group of sections headed: "Further restrictions and obligations on landlords and mortgagees."

The defendant, who was a tenant for a term of three years from March, 1919, of a dwelling house within the Act was, in May, 1920,

(1) 12 R. P. C. 266.

desirous of giving up his tenancy, and in that month he agreed with the plaintiff that upon payment by the latter to him of a premium he would surrender his tenancy and the landlord would grant the plaintiff a new tenancy for three years at a slightly increased rent. The landlord did not know that the plaintiff had agreed to pay the defendant a premium. The plaintiff paid the defendant the premium, and the landlord granted the plaintiff a new tenancy for three years. After the Act of 1920 came into operation the plaintiff sued to recover back the premium :—

Held, that s. 8, sub-s. 1, was reasonably capable of two constructions; that, the section being a penal one, the Court should give it the more lenient construction avoiding the imposition of a penalty; that, construed in this light, the prohibition in the section was limited to the person who required the payment of the premium "in addition to the rent" and "as a condition of the grant, renewal, or continuance" by him of the tenancy, namely, the landlord; and that the plaintiff was not entitled to recover.

APPEAL from an order of the Divisional Court affirming the decision of the county court judge of Wandsworth.

The action was brought to recover back a premium of 180*l.* paid by the plaintiff to the defendant in the following circumstances. In March, 1919, the landlord of a house at Wandsworth Common let it to the defendant on a three years' agreement at a rent of 42*l.* a year. The defendant in May, 1920, was desirous of giving up his tenancy, and the landlord was willing to release him if he found a satisfactory tenant in his place. The defendant thereupon inserted an advertisement in the Daily Telegraph, which, after stating that the house was to let (describing it), proceeded: "Three years' agreement, vacant June 1; 48*l.* p.a. and rates; 180*l.* secures." The landlord did not know about the 180*l.* being demanded as a condition of getting the house. The plaintiff saw the advertisement, and in the result paid the 180*l.* (which included a sum of about 10*l.* for fixtures) to the defendant, who surrendered his tenancy, and on May 20 the landlord signed an agreement with the plaintiff for a three years' lease of the house at a rent of 48*l.* a year. On July 2, 1920, the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, was passed and came into operation, s. 8 of which is set out in the headnote above.

The plaintiff thereupon brought this action in the county court to recover back the 180*l.* The judge held that s. 8

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did not apply, and gave judgment for the defendant. In the Divisional Court Bailhache J. was of opinion that the section applied; while Shearman J. was of opinion that the word "person" meant landlord, and that the section did not apply. The judgment of the county court judge therefore stood.

The plaintiff appealed.

A. H. Woolf for the plaintiff. The word "person" in s. 8, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, is not confined to the landlord. It is of general application. The 180*l.* was paid by the plaintiff to the defendant as the "condition of the grant of the tenancy." In s. 1, sub-s. 2, of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (5 & 6 Geo. 5, c. 97), now repealed by the Act of 1920, "the fine, premium, or other like sum," if paid, "shall be recoverable by the tenant by whom it" (the payment) "was made from the landlord." In s. 8, sub-s. 1, of the Act of 1920 the words are wider—"shall be recoverable by the person by whom it was made or given." Sect. 15, sub-s. 2, is not inconsistent with this construction of s. 8, sub-s. 1, of the Act of 1920. The intention of the Act is to prevent profiteering by either landlord or tenant: see s. 12, sub-s. 1 (*g*). If the view of Shearman J. is right, the landlord is the only person who cannot take a premium, and the mischief aimed at by the section will be let in.

[*Mason* v. *Harris* (1), where it was held that the taking of a premium for the assignment of a lease was not within the prohibition in s. 8, sub-s. 1, was cited.]

C. Bray for the defendant. By s. 8, sub-s. 1, of the Act of 1920 the fine, premium, or other like sum, to come within the prohibition in the section, must be required by the person who "grants, renews, or continues" the tenancy or sub-tenancy, and who requires the payment of that sum "in addition to the rent"—that is to say, by the landlord. The payment must be required "as a condition of the grant,

(1) [1921] 1 K. B. 653.

renewal, or continuance" of the tenancy or sub-tenancy—that is, it must be a term of the grant, etc. The present case therefore is not within the prohibition in the section. The difference between the language of s. 1, sub-s. 2, of the Act of 1915, and that of s. 8, sub-s. 1, of the Act of 1920 may be accounted for by the introduction into the later section of a sub-tenancy. The section being a penal one, if there are two reasonable constructions of it the Court should adopt that construction which avoids the imposition of the penalty. Moreover the section is retrospective in its operation, and "a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary": per Lindley L.J. in *Lauri* v. *Renad.* (1) The judgment of Shearman J. is therefore right.

Woolf in reply.

BANKES L.J. I do not think it can be said that the language of s. 8 of the Increase of Rent, &c., Act, 1920, is other than ambiguous. The facts do not appear to me to be very precisely ascertained. [The Lord Justice referred to the evidence as set out in the county court judge's notes, and said that he would assume for the purpose of his judgment that it was the defendant's wife who negotiated the tenancy to the plaintiff.] The position then was this, that the plaintiff had made it a condition of his paying the 180*l.* to the defendant that the latter should leave the premises and hand over the fixtures, and that the landlord should grant to the plaintiff a fresh tenancy for three years. Assuming that to be the true inference from the facts, the question is whether that brings the case within the terms of s. 8 of the Act of 1920.

It is said that s. 8 differs materially from the corresponding section in the Act of 1915. No doubt it does, because the section in the Act of 1915 which dealt with the demand of a fine or premium in addition to the rent was aimed in express terms at the landlord; it was the landlord alone who was referred to in that section. I do not

(1) [1892] 3 Ch. 402, 421.

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however myself derive any assistance from the difference in the language of the two sections. The section in the Act of 1920 expressly includes something which was not included in the Act of 1915—namely, a sub-letting; and this may well have been the reason for the alterations one finds in the language of the later section. One must apply oneself to the language of s. 8. When the section says that "a person shall not, as a condition of the grant, renewal, or continuance of a tenancy or sub-tenancy . . . . require the payment of any fine, premium or other like sum," does it refer merely to the demand of a fine, premium, or other like sum by the person who grants the tenancy—that is the landlord—or does it include a demand by a third person? The language of the section does not supply any clear answer; it is, in my opinion, reasonably capable of either construction. We are dealing with a penal section, and therefore one must apply the well-known general rule of construction, that if there are two reasonably possible meanings the Court should adopt the more lenient one. We are also dealing with one in a group of sections which are controlled by the heading —in so far as the Court should apply the heading in interpreting the sections in the group: "Further restrictions and obligations on landlords and mortgagees." One must approach the language of the section subject to those considerations. In my opinion the more natural construction of the section is to read it as applying to a person who, as a condition of his granting, renewing, or continuing a tenancy, requires the payment of a "fine, premium or other like sum"; and this construction is assisted by the use of the words "in addition to the rent," because it is more appropriate to speak of a person requiring a payment "in addition to the rent" as meaning a person who is in a position to control the rent, than as including a person who is a stranger to the agreement under which the rent is created.

I do not think the matter is plain, but, on the whole, I prefer the view taken by Shearman J., and therefore the appeal must be dismissed.

SCRUTTON L.J. I think the construction of s. 8 is a matter of considerable doubt. I am very much influenced in the conclusion at which I have arrived by the well-recognized rule as to construing penal sections. In *Tuck* v. *Priester* (1) Lord Esher M.R. said: "But then comes the question whether the plaintiffs are also entitled to recover penalties under s. 6. We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections." Lindley L.J. said (2): "Having regard to the well settled rule that the Court will not hold that a penalty has been incurred, unless the language of the clause which is said to impose it is so clear that the case must necessarily be within it, I think we ought to keep on the safe side and say that the words 'unlawfully made' are sufficiently ambiguous to enable the defendant to escape from the penalty which is imposed by section 6. . . . . Dealing with a penal clause, we ought to apply to it that strict or cautionary interpretation which the Courts are in the habit of giving to such clauses."

I take the facts to be that a tenant holding under a three years' agreement desiring to go out of possession before the three years had expired took a payment from an incoming tenant for the surrender of his tenancy, some fixtures, and for procuring from the landlord a grant of a new tenancy for three years. I think that accurately expresses what probably happened. Does that transaction come within s. 8? Sect. 8 is one of a group of sections headed "Further restrictions and obligations on landlords and mortgagees." It begins: "A person." Why "A person" and not "A landlord"? I am not sure that that criticism is not a little too hypercritical as applied to this Act, which is not very well drafted. Whilst the use of the word "person" rather favours the view that more than the landlord is

(1) (1887) 19 Q. B. D. 629, 638. (2) Ibid. 645.

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contemplated, it seems to me that the words "as a condition of the grant, renewal, or continuance of a tenancy" point markedly to the condition being made by the person who grants, or renews, or continues the tenancy—namely, the landlord. And I think "the payment of any fine," etc., "in addition to the rent" points the same way. Sect. 8 appears to me to be reasonably capable of two meanings. But, on the whole, I think it is rather more capable of the meaning that it is only intended to apply to the landlord. The section being reasonably capable of two meanings, inasmuch as the contravention of it renders a person liable to summary conviction, I apply to it the rule in reference to the construction of penal statutes and select for it the least burdensome construction. The way in which Maxwell on the Interpretation of Statutes, 2nd ed., pp. 345, 346; 6th ed., p. 500, puts it is this: "Where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the Legislature which has failed to explain itself."

I agree that the appeal should be dismissed.

ATKIN L.J. I have had great difficulty with regard to the construction of this section. If it stood by itself apart from other legislation, I should be inclined to come to the conclusion that if a tenant had come to an agreement with his landlord for the landlord to grant to him or his nominee either a new tenancy or a renewal of his old tenancy for a certain period of time, and the tenant found a person to act as his nominee to whom he could sell the right to possession, and demanded of that person a sum of money, that sum of money would be demanded from the third person as "a condition of the grant of the tenancy" by the landlord. If so, that would cover this case, because I am inclined to think that there was an arrangement come to between the landlord and the defendant by which the landlord had agreed with the defendant to grant a tenancy of the premises for a term of three years at an increased

rent to a new tenant who might be found by the defendant. That I think is the conclusion I should have come to if I had had to construe this section alone. But the matter is not free from doubt.

In coming to a final conclusion it is very relevant to bear in mind the language used in the preceding legislation. Sect. 1, sub-s. 2, of the Increase of Rent, &c., Act, 1915, said: "A person shall not in consideration of the grant, renewal, or continuance of a tenancy of any dwelling-house to which this Act applies require the payment of any fine, premium, or other like sum in addition to the rent." Those are the very words used (with certain additions) in s. 8, sub-s. 1, of the Act of 1920, except that "in consideration of" now becomes "as a condition of" the grant. The words in the section of the Act of 1915 clearly refer to the landlord, because the section goes on to provide that the amount shall be recoverable by the tenant by whom it was paid from the landlord. Therefore, it is plain what was meant by the use of these words in that Act. They meant the payment of a sum to the landlord in consideration of a grant by him; and when one finds precisely the same words used in the later Act, one would naturally presume that they were used in the same sense as in the previous legislation dealing with precisely the same subject-matter.

As at present advised it appears to me that the decision in *Mason* v. *Harris* (1), that there is nothing to prevent a tenant from taking a premium for an assignment of the remainder of his term of tenancy, is right. I do not see how an assignment of that kind can be brought within the words of s. 8, sub-s. 1. If that degree of mischief, as it is called, in the section is allowed, it is all the easier to find that the so-called mischief may be more extensive.

The conclusive consideration however is that this is a penal section. I think there is quite sufficient doubt about the matter to compel one to take the more lenient view. There are two reasonably possible constructions which can be put upon the section. Under these circumstances I think I am

(1) [1921] 1 K. B. 653.

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forced to come to the conclusion that the view taken by Shearman J. is the right one, and I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Telfer Leviansky & Co.*
Solicitors for defendant: *W. W. Young, Son & Ward.*

W. F. B.

1921
April 21.

VAUGHAN *v.* GRINDELL.

Fertilisers and feeding Stuffs—Omission to send Invoice—Failure to send Sample to Seller—Condition precedent to Prosecution—Fertilisers and Feeding Stuffs Act, 1906 (6 *Edw.* 7, *c.* 27), *s.* 1, *sub-s.* 1; *s.* 3, *sub-ss.* 3, 4 (*b*) *s.* 6, *sub-ss.* 1 (*a*), 3.

It is a condition precedent to a prosecution of the seller under s. 6 sub-s. 1 (*a*), of the Fertilisers and Feeding Stuffs Act, 1906, on a charge of not sending an invoice on the sale of a fertiliser of the soil according to the provisions of s. 1, sub-s. 1, that a prescribed portion of the sample thereof taken with a view to the proceedings under s. 3, sub-s. 3, shall have been sent to the seller.

CASE stated by justices for Kingston-upon-Hull.

At petty sessions holden on November 5 and 19, 1920, an information preferred by the appellant John Oliver Vaughan, the official sampler for Kingston-upon-Hull under the Fertilisers and Feeding Stuffs Act, 1906 (6 Edw. 7, c. 27), against the respondent John Grindell, charged that the respondent between February 18, 1920, and April 28, 1920, having sold to the Humber Fishing and Fish Manure Co., Ld., for use as a fertiliser of the soil a certain article which had been subjected to an artificial process in the United Kingdom or had been imported from abroad, to wit, six tons of superphosphate of lime, did unlawfully fail without reasonable excuse to give to the above company on or before or as soon as possible after the delivery of the said article, the invoice required by s. 1, sub-s. 1, of the above Act (1) stating the

(1) Fertilisers and Feeding Stuffs Act, 1906 (6 Edw. 7, c. 27), s. 1, sub-s. 1: "Every person who sells for use as a fertiliser of the soil any

name of the article and the respective percentages (if any) of nitrogen, soluble phosphates, insoluble phosphates and potash contained in the article. Attached to the summons was a copy of the certificate of Arnold Rowsby Tankard, the official agricultural analyst for Hull. The result of the analysis showed a deficiency in soluble phosphates when compared with the guarantee on the sample bottle. The following facts were proved or admitted. The appellant, in accordance with a request by the Humber Fishing and Fish Manure Co., Ld., gave notice to the respondent of his intention to take in the manner prescribed by the Act and regulations thereunder a sample of the superphosphate of lime received by the company. The respondent denied having received this letter. On March 6, 1920, the appellant accordingly took a sample, dividing it into three parts, which he put into three bottles, sealed and labelled them, handing one to the company, the purchasers, and the remaining two to the official agricultural analyst. The latter analysed one of them, and sent the other to James J. Dobbie, the chief analyst. (1)

article which has been subjected to any artificial process in the United Kingdom, or which has been imported from abroad, shall give to the purchaser an invoice stating the name of the article and what are the respective percentages (if any) of nitrogen, soluble phosphates, insoluble phosphates, and potash contained in the article, and the invoice shall have effect as a warranty by the seller that the actual percentages do not differ from those stated in the invoice beyond the prescribed limits of error."

Sect. 3, sub-s. 3: "Where a sample has been taken with a view to the institution of any civil or criminal proceeding, the person taking the sample shall divide the sample into three parts, and shall cause each part to be marked, sealed, and fastened up, and shall deliver or send by post two parts to the agricultural analyst and one part to the seller."

Sub-s. 4: "An agricultural analyst to whom a sample is submitted for analysis under this section . . . . (*b*) if the sample has been so divided into parts, shall analyse one of the parts of the sample delivered or sent to him and retain the other. . . . ."

Sect. 6, sub-s. 3: "A prosecution for an offence under this section shall not be instituted except with the consent of the Board of Agriculture and Fisheries, and the Board shall not give such consent until the part of the sample retained by the agricultural analyst has been analysed, and a certificate of analysis given, by the chief analyst."

(1) The official agricultural analyst acts for the county or borough, and is appointed by the county council or county borough council; the chief agricultural analyst, or "chief analyst," is appointed by the Board of Agriculture: see s. 2, sub-ss. 1 and 2.

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The contract by the company with the respondent was made on February 13, 1920, and was for the purchase from him of ten tons of superphosphate of lime of a certain solubility. On February 18 the company received three tons from the respondent, but no invoice was sent with it. On February 23 a further four tons were sent, and it was from this consignment that the above sample was obtained. No invoice was sent with it. The company pressed the respondent for an invoice, and wrote to him on five different occasions. but none was ever sent. The company refused to take the balance of three tons.

On behalf of the respondent it was submitted that it was essential for the appellant to prove that the provisions as to the taking of samples, analysis, etc., had been complied with, and that s. 3, sub-ss. 3 and 4, of the Act (1) had not been complied with, inasmuch as no part of the sample taken by the appellant had been sent to the respondent, although the sample was taken with the view of instituting a civil or criminal proceeding. It was also contended that the certificate should have been sent by the official agricultural analyst to the seller, the respondent, in accordance with s. 3, sub-s. 4 (*b*). (1)

The magistrates upheld these contentions and dismissed the information, subject to this case.

A. M. Latter for the appellant. It is contended by the respondent that as the sample in this case was taken with a view to the institution of criminal proceedings, it was a condition precedent to the taking of these proceedings that one part should have been sent to the seller under the provisions of s. 3, sub-s. 3, of the Fertilisers and Feeding Stuffs Act, 1906. (1) But the only charge against the respondent was one under s. 6, sub-s. 1 (*a*), of failing to give an invoice, and there would be no object in sending the seller a sample; of course this would be otherwise if the charge were one under s. 6, sub-s. 1 (*b*), of permitting the invoice to be false.

(1) See note (1), p. 412.

[*Korten* v. *West Sussex County Council* (1) was referred to.]

[He was stopped.]

du Parcq for the respondent. A sample should have been sent to the seller. It is of vital importance that the quality of the goods should be shown, for should it turn out that they do not comply with the proper standard of quality under the contract the omission to send the invoice would assume a more serious aspect, and a presumption would arise that the seller omitted to send it with a sinister purpose. But if the sample shows that the feeding stuff was of proper quality, then the offence might be a venial one, and there might even be no prosecution at all. Under the provisions of sub-s. 3 of s. 6 (2) the consent of the Board of Agriculture is necessary before a prosecution for this offence can be commenced, and the Board is not to give its consent "until the part of the sample retained by the agricultural analyst has been analysed." That can only refer to the part of the sample sent to the agricultural analyst under s. 3, sub-s. 3, by the person taking the sample, and retained by him under sub-s. 4 (*b*). (2) But that assumes that all the steps prescribed by s. 3, sub-s. 3 (2), have been complied with—that is, that a part of the sample has been sent to the seller. Sect. 6, sub-s. 3 (2), was passed to meet one of the points decided in *Korten* v. *West Sussex County Council* (1), and that case is not now applicable. If the quality of the goods is material it is obvious that the seller should have a part of the sample.

[*Barnes* v. *Chipp* (3) was also referred to.]

A. M. Latter in reply. Sect. 6, sub-s. 3 (2), makes the consent of the Board of Agriculture a condition precedent to a prosecution, and the Court is asked by the respondent to add another condition precedent—namely, the sending of a sample to the seller. If the taker of the sample has complied with s. 3, sub-s. 3 (2), and sent two parts to the agricultural analyst, then there is something for s. 6, sub-s. 3 (2), to operate upon—namely, the part of the sample retained

(1) (1903) 72 L. J. (K. B.) 514; 67 J. P. 167.

(2) See note (1), p. 412.

(3) (1878) 3 Ex. D. 176.

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by the analyst, and it does not become necessary to consider s. 3, sub-s. 3 (1), further. *Korten* v. *West Sussex County Council* (2) is still good law except as to the offence of causing an invoice to be false, and the operation of s. 9, sub-s. 2 (*b*) (1), which altered the law in respect of that offence, and made analysis a condition precedent to a prosecution, is confined to that offence, and does not extend to that of failing to send an invoice.

It is not necessary to send a formal invoice under s. 1, sub-s. 1; anything which purports to be an invoice would suffice.

[*Needham & Co.* v. *Worcestershire County Council* (3) was also referred to.]

LAWRENCE C.J. This is a case stated by justices in a prosecution under the Fertilisers and Feeding Stuffs Act, 1906. The justices refused to convict. They overruled most of the objections raised by the respondent in the case, but ruled in his favour in respect of the contention that the appellant, who was the official sampler, had not complied with the Act by sending to the respondent part of the sample that he had taken for the purpose of instituting a prosecution, which, it was contended, was a condition precedent thereto. It has been argued that the sending of the sample was not a condition precedent to a prosecution on the charge in question here—namely, that of omitting to send an invoice of the article sold to the buyer, though it may be where the charge is one of sending a certificate that is false. The Act provides in s. 1 [His Lordship read the section. (1)] That is an enactment with which every seller of these fertilisers must comply; and it is plainly a very important provision of this rather complicated statute, because it gives the purchaser a considerable amount of information with regard to the article he is buying, and amounts to a warranty by the seller that the article so delivered complies with the invoice. The respondent omitted to give that invoice, and it has been

(1) See note (1), p. 412. (2) 72 L. J. (K. B.) 514; 67 J. P. 167.
(3) (1909) 100 L. T. 901.

argued by Mr. Latter for the appellant that in a prosecution for not sending an invoice it was not necessary that the provisions of s. 3, sub-s. 3, of the Act as to sending a part of the sample to the seller should have been complied with. By that sub-section it is provided [His Lordship read the sub-section. (1)] That was not done; no part was sent to the seller. Sect. 6, sub-s. 1, begins with this provision: "If any person who sells any article for use as a fertiliser of the soil or as food for cattle or poultry commits any of the following offences, namely:—(*a*) Fails without reasonable excuse to give, on or before or as soon as possible after the delivery of the article, the invoice required by this Act," shall be liable to a fine, etc. Then comes sub-s. 3 (1), which requires the consent of the Board before a prosecution for this offence can be instituted, and that this consent shall not be given until the part of the sample retained by the agricultural analyst has been analysed, and a certificate of the analysis given by the chief analyst. These conditions seem to me to be conditions precedent to a prosecution either for failing to send an invoice or for sending a false invoice.

Though the matter is complicated it is plain that according to the provisions of s. 3, sub-s. 3 (1), a sample must be sent to the seller. Sub-s. 3 and sub-s. 4 (*b*) of s. 3 (1) make it quite plain that the sample must be divided into three parts and one part and the analyst's certificate sent to the seller. That was not done in this case, and I think that, the provisions of the Act not having been complied with, the justices were right in refusing to convict.

DARLING J. I am of the same opinion. This statute is very confused, and what it intends is only to be collected, if it can be collected at all, by reading a number of sections and sub-sections and collating them one with another. I have come to the conclusion that the meaning is that the sending of the sample to the seller shall, notwithstanding all the other things that have to be done, be a condition precedent to a prosecution. One always likes to find whether

(1) See note (1), p. 412.

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the provisions enacted in an Act of Parliament can serve any purpose. I think I can see that it is expedient that a part of the sample should be sent to the seller even when the only charge is that of not sending an invoice in the terms prescribed by the Act, and for this reason: The not sending of the invoice at all might well be a very venial offence, and the analysis might show that the stuff supplied was absolutely up to the contract and the sample; but if the analysis showed otherwise then the penalty for not sending the invoice should naturally be greater. This is not a common invoice; it is an invoice practically in statutory form and amounts to a guarantee of what the article is. I think it was intended that the magistrates should not only be in a position to convict, but to impose a light or heavy penalty according as, in their opinion, the not sending the invoice was a mere mistake or was an omission occasioned by a desire to conceal the want of quality in the article supplied.

AVORY J. I agree. The consent of the Board of Agriculture is clearly a condition precedent to any prosecution for the offence of failing to send or give the invoice required by the Act. That consent under sub-s. 3 of s. 6 (1) cannot be given until the part of the sample retained by the agricultural analyst has been analysed and the certificate of analysis given by the chief analyst. Turning back to s. 3, sub-ss. 3 and 4 (1), it is clear that the part of the sample retained by the agricultural analyst can only mean the part which has been retained after the provisions of sub-s. 3 (1) have been complied with, which are that the person who has taken the sample is to divide it into three parts, cause the parts to be marked and fastened up, and deliver by post two parts to the agricultural analyst and one part to the seller; and it is only after this has been done that the agricultural analyst can be in possession of the part which he retains, and he retains that for the purpose, if necessary, of submitting it to the public analyst. It therefore appears to me to follow that one cannot arrive at the meaning of

(1) See note (1), p. 412.

the words in s. 6, sub-s. 3, "the part of the sample retained by the agricultural analyst," until one assumes that all the steps required by sub-s. 3 of s. 3 have been taken, and one of those steps is that one part of the sample shall have been sent to the seller. Therefore, even if not set out in terms, it is necessarily involved that the sending of a part to the seller becomes a condition precedent to the prosecution. Sub-s. 4 of s. 6, which requires that in any prosecution for the offence of failing to give an invoice there must be issued and served with the summons a copy of the analyst's certificate, entirely bears out the view which my brother Darling has expressed, that the Act contemplates that, even where a man is only charged with failing to send an invoice, the Court is to take into consideration the character of the goods he supplied. If they are to take that into consideration it is obvious that the seller ought to have the opportunity of testing the sample before he can be convicted on the summons.

Appeal dismissed.

Solicitors for appellant: *Sharpe, Pritchard & Co., for H. A. Learoyd, Town Clerk, Kingston-upon-Hull.*

Solicitors for respondent: *C. J. Smith & Hudson, for Geo. L. Shackles, Kingston-upon-Hull.*

W. L. L. B.

1921
May 9.

LESLIE SHIPPING COMPANY *v.* WELSTEAD.

(THE RAITHWAITE.)

[1921. L. 523.]

Shipping—Charterparty—Time Charter—Hire payable Monthly in Advance —Power to withdraw Ship if Hire not paid—Default in monthly Payment —Withdrawal of Ship—Loss of future Hire—Claim by Owners—Right to Recover—Cause of Loss—Non-payment of Hire or withdrawal of Ship.

A charterparty, by which a steamship was let for thirty-six months, provided that payment of the agreed hire should be made monthly in advance, and that "In default of such payment . . . . the owners shall have the faculty of withdrawing the said steamer from the service of the charterers, without prejudice to any claim they (the owners) may otherwise have on the charterers under this charter." The charterer made default in paying the third and fourth months' hire, and the shipowners thereupon withdrew the steamship. The shipowners brought an action against the charterer claiming the hire in arrear at the date of the withdrawal and also damages for loss of hire under the charterparty during the remainder of the chartered period, the damages being based upon the difference between the rate of hire fixed by the charter and the hire that could be got apart from the charter:—

Held, that the plaintiffs were entitled to recover, besides the hire in arrear, damages for loss of the future hire measured as aforesaid, inasmuch as these damages were the natural and probable result of the default of the defendant in paying the hire, and not of the withdrawal of the steamship by the plaintiffs.

ACTION in the commercial list tried by Greer J.

By a charterparty dated March 29, 1920, in the form of the Baltic and White Sea Conference Uniform Time Charter, 1912, made between the plaintiffs, the Leslie Shipping Co., of Dundee, the owners of the steamship *Raithwaite*, carrying about 5176 tons deadweight, and the defendant Frederick Welstead, of London, as charterer, it was agreed (inter alia) (clause 1) that the plaintiffs should let and the defendants should hire the steamship for thirty-six calendar months from the time the steamship was delivered to the charterer as therein provided, on the following conditions; (clause 2) that the owners should provide and pay for all provisions and wages, for insurance of the steamship, and for all deck and engine-room stores and maintain the steamship in an

efficient state during the service; (clause 3) that the charterers should provide and pay for all coals, fuel, water for boilers, etc.; (clause 5) that the charterers should pay as hire for the steamship 25*s.* per ton on its summer deadweight for the first twelve months, 22*s.* 6*d.* for second twelve months, and 20*s.* per like ton for third twelve months per calendar month commencing from the time the steamship was placed at the disposal of charterers and pro rata for any fractional part of a month until her redelivery to owners as therein stipulated; that the payment of the hire should be made in London in cash without discount monthly in advance; and that "In default of such payment or payments, as herein specified, the owners shall have the faculty of withdrawing the said steamer from the service of the charterers, without prejudice to any claim they (the owners) may otherwise have on the charterers under this charter"; (clause 9) that, although appointed by the owners, the captain should be under the orders and direction of the charterers as regards employment, agency, or other arrangements; and (clause 23) that the charterers should have the option of subletting the steamship, but the original charterers always to remain responsible to owners for due performance of the charter.

On May 28, 1920, the steamship was delivered to the defendant at Greenock; and thus came on hire under the charterparty.

The defendant paid to the plaintiff the first and second months' hire due on May 28 and June 28, 1920, respectively.

The defendant did not pay the third month's hire, which became due on July 28, 1920; but pursuant to an agreement between the parties in respect of that month's hire two bills of exchange of the last-mentioned date were drawn by the plaintiffs upon and accepted by the defendant, payable thirty days after date, the one for 6000*l.* and the other for 500*l.* 16*s.* 5*d.*

The defendant, alleging that he had accepted the bills subject to a condition which had not been fulfilled by the plaintiffs, dishonoured the bills by non-payment on presentation.

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The defendant did not pay the fourth month's hire, which became due on August 28, 1920.

On September 22, 1920, the plaintiffs, claiming to be entitled to do so under clause 5 of the charterparty, withdrew the steamship from the service of the defendant without prejudice to any claim they might have on the defendant under the charterparty.

On February 18, 1921, the plaintiffs brought the present action against the defendant claiming damages for breach of the charterparty and alternatively hire thereunder.

The plaintiffs, in their points of claim, alleged (para. 5) that in breach of the charterparty the defendant failed to pay the third month's hire on July 28, 1920; and that in pursuance of the aforesaid agreement the said bills of exchange were accepted by the defendant; (para. 6) that these bills were dishonoured by the defendant, and in breach of the said agreement and/or charterparty the amount of the bills had not been paid by the defendant, whereby the plaintiffs had suffered damage; (para. 7) that in breach of the charterparty the defendant failed to pay the fourth month's hire, which became due on August 28, 1920, whereby the plaintiffs suffered damage; (para. 8) that by reason of the premises the plaintiffs were entitled to withdraw the steamer from the service of the defendant under the charterparty without prejudice to any claim they had on him under the charterparty, and that on or about September 22, 1920, the plaintiffs withdrew the steamer accordingly without prejudice to any such claim; (para. 9) that by reason of the said breaches of charterparty committed as aforesaid by the defendant, the plaintiffs had suffered damage and had lost the amount of hire for which the defendant was liable under the charterparty to the plaintiffs during the remainder of the chartered period, or alternatively the difference between the said amount and the amount for which the steamer could, on the said date of withdrawal, have been let on the market upon similar terms. And the plaintiff claimed (1.) under paras. 5 and 6 the amount of the said bills of exchange and certain charges and interest; or alternatively the said amount as hire due under the

charterparty on July 28, 1920, or damages for non-payment thereof; (2.) under para. 7 the hire due under the charterparty on July 28, 1920; or the amount thereof as damages for non-payment thereof; and (3.) under paras. 8 and 9 184,610*l.* 13*s.* 4*d.*, as the total amount of the hire under the charterparty in respect of the remaining two years and eight months of the chartered period; or alternatively 76,501*l.* 5*s.* 8*d.*, as the difference between the said total amount of hire and hire for the said remainder of the chartered period at the rate ruling at the date of withdrawal at which the steamer could have been let on the market. Less credit for certain bunker coal 3920*l.*

The defendant in his points of defence and counterclaim stated (inter alia) (para. 3) that he accepted the said bills of exchange conditionally on the terms of the charterparty having been complied with by the plaintiffs; (para. 4) that the plaintiffs represented to the defendant, and there were terms of the charterparty and the plaintiffs thereby warranted, that the steamship was capable of a certain speed and that the plaintiffs should maintain the steamship in an efficient state during the service; (para. 5) that these representations were false and these warranties and terms of the charterparty broken by the plaintiffs in certain specified respects; (para. 9) that by reason of the premises the plaintiffs were not entitled to payment of the hire referred to in para. 5 of the points of claim and that the defendant was justified in dishonouring the bills of exchange; and that the plaintiffs in withdrawing the steamship acted wrongfully and in breach of the charterparty; and (para. 11) that the alleged damage was too remote and not recoverable in law. And in his points of counterclaim the defendant stated that by reason of facts therein set out he had suffered damage in respect of which he counterclaimed sums amounting in all to upwards of 70,000*l.*

At the trial evidence was brought on both sides as to the damages sustained by the plaintiffs, and an agreement was come to as to the manner in which they should be estimated, the amount arrived at being 47,743*l.*, subject to the question of law.

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Raeburn K.C. and *Clement E. Davies* for the plaintiffs. The defendant made default in payment of the third and fourth months' hire of the steamship, and the plaintiffs are entitled to recover from him these two months' hire. Moreover, by reason of the defendant's said default, the plaintiffs became entitled under clause 5 of the charterparty to withdraw the steamship from the service of the defendant without prejudice to any claim they might otherwise have on the defendant under the charter, and they withdrew the steamship accordingly. The plaintiffs thereby suffered damage, the measure of which is the difference between the amount of the hire which they would have received from the defendant during the remaining thirty-two months of the chartered period, and the hire that they can get for the steamship during that time free from the charterparty. That damage is the natural consequence of the non-payment by the defendant of the third and fourth months' hire, and the plaintiff is entitled to have it made good by the defendant.

Barrington-Ward K.C. and *H. S. Simmons* for the defendant. As the defendant did not pay the third and fourth months' hire, it is admitted that the plaintiff is entitled to recover these two months' hire. It is also admitted that by reason of the defendant's default the plaintiffs were entitled under clause 5 of the charterparty to withdraw the steamship from the defendant. The plaintiffs are not, however, entitled to anything more. The damage, if any, which they may suffer in loss of hire during the portion of the chartered period subsequent to the withdrawal of the steamship is damage resulting not from the default of the defendant in not paying the hire, but from the plaintiffs' own act in withdrawing the steamship from the defendant.

GREER J. This is an action brought by the Leslie Shipping Company, for hire due under a charterparty, less certain credit, and for damages that arise from the withdrawal of the vessel in consequence of the defendant's non-payment of hire in accordance with the terms of the charterparty. The charterparty, which is dated March 29, 1920, was for thirty-six

months, and it began to run on May 28, 1920. At the date of the withdrawal two months' hire was due. One of these two months' hire had been paid by bill, but the bill had been dishonoured. The other months' hire had not been paid at all, though they had become due in advance.

The question which I have to decide is whether or not, on account of the withdrawal of the vessel in those circumstances, the plaintiffs are entitled to say that by reason of the defendant's breach of the contract they have lost the benefit of the hire for the rest of the charterparty period and are therefore entitled to damages based upon the difference between the charter rate and the best possible rate that he could have got during that period outside the charterparty. The question turns on clause 5 of the charterparty. It is said for the plaintiffs that the damages which they claim—namely, the loss of the chartered hire less the earnings that could be got by the vessel free from the charter—are the natural and probable consequence of the non-payment by the defendant of the monthly hire in advance. It is said on the part of the defendant on the other hand that these damages are due to the withdrawal of the vessel from the charterparty by the plaintiffs, and that the only remedy in these circumstances which the plaintiffs have is to get hire at the agreed rate up to the date when they withdrew the vessel and to get their vessel back by withdrawal, but that they are not entitled to put themselves in the same position as if the defendant had adhered to the terms of the charterparty. It seems to me that the point is not free from difficulty, and if I had not already expressed my opinion upon it in a previous case against the same defendant (1) I might have taken time to consider the point, but having regard to my previous expression of opinion, I do not think it is necessary that I should do so.

On the whole my view is that the damages arise as the

(1) *Merlin Steamship Co.* v. *Welstead* (The Kenmare). Greer J., April 5, 28, 29, 1921.

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natural and probable consequence of the defendant's breach of contract in failing to pay the two instalments of hire which were due at the time of the withdrawal.

How should the matter be regarded in the circumstances as between the parties? The vessel was in the hands of the defendant under this charterparty when the market was going against him. He gave bills for one month's hire, which he did not meet, and in addition to that when another month's hire became due he did not pay that next month's hire. Would not any shipowner have been entitled to suppose from such conduct as that that the charterer was not going to pay the hire during the subsequent months of the charterparty? The defendant had allowed his own bill for one month's hire to be dishonoured, a default which a person rarely makes in business if he can possibly avoid it; and when the next month's hire became due he did not pay it. I think that, apart altogether from clause 5 of the charterparty, that conduct on the part of the defendant would amount in law to a repudiation by the defendant of a fundamental part of this contract, entitling the plaintiffs to treat it as at an end. It seems clear that clause 5, which is inserted in the charterparty not to the detriment of the plaintiffs, but for their benefit, gives them in these circumstances an express right to withdraw the vessel, and makes it impossible that there should be any discussion about the matter. This clause cannot, I think, be treated as cutting down the rights which the plaintiffs would have had in the absence of such a clause. For these reasons I am against the somewhat belated argument that has been put forward on behalf of the defendant, and my judgment is that the plaintiffs are entitled not only to recover the hire due on September 22, 1920, the date of the withdrawal, and to withdraw the vessel, but also to damages calculated on the basis of the evidence that has been given and in the manner that has been put forward and agreed upon during the hearing of the case. There will therefore be judgment for the plaintiffs for 47,743*l.* This will be without prejudice to any further action by the

defendant on the claim set up in his counterclaim. If the defendant thinks that there is any substance in his counterclaim for damages, he can bring an action for those damages.

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Solicitors for plaintiffs : *Botterell & Roche.*
Solicitor for defendant : *A. H. Baker.*

J. R.

DELL *v.* CHESHAM URBAN DISTRICT COUNCIL.

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April 26, 27, 28, 29; *May* 5, 13.

[1920. D. 795.]

Highway—Public Health—Local Government—Road Surface—Drainage—Tar Acid—Damage to Watercress Beds—"Sewage or filthy water"—"Noxious matter"—Statutory Powers—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 15, 16, 17.

In s. 17 of the Public Health Act, 1875, "filthy water" is distinguishable from "sewage," and includes any matter, whether "foul" or "noxious," which would "affect or deteriorate the purity and quality of the water."

Surface water from a road retained by a local authority under the Local Government Act, 1888, s. 11, sub-s. 2, had long drained into watercress beds occupied by the plaintiff, and through them into the river beyond. In May, 1919, the local authority, in order to allay dust nuisance, sprayed the road with tar. This was the only method then open to them, and the work was done in the public interest and with due care. Six months afterwards frost broke up the tar, and the road water, containing tar acid, destroyed the plaintiffs' beds :—

Held, that the road water was "noxious matter" within the above section : that the defendants had power to tar spray the road, but that they could not justify the damage to the plaintiff without showing that it was a necessary consequence of the exercise of the power.

ACTION tried by Salter J.

The plaintiff was the owner and occupier of certain watercress beds at Chesham in the county of Bucks between the river Chess and a main road known as Red Lion Street. The defendants were the road authority for the district, and as such were responsible for the maintenance and repair of Red Lion Street. Surface waters from Red Lion Street were discharged through the defendants' pipes and sewers into

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the plaintiff's beds, and the plaintiff alleged that the defendants had allowed surface waters charged with tar or other chemicals to be discharged into her beds, so that in November, 1919, the watercress sickened and died.

The facts are fully set out in the judgment of Salter J.

On May 8, 1920, the plaintiff issued a writ, claiming an injunction and damages against the defendants as having caused the damage to the beds. The defendants in their defence denied that they had caused the damage, and further, or in the alternative, said (A) that as surveyors of highways and/or as agents of the Buckingham County Council it was their duty under the Local Government Act, 1888, s. 11, sub-s. 2, at all times properly to maintain and repair Red Lion Street, and to carry out any reasonable improvements connected with such maintenance and repair; (B) that tar-spraying was necessary for mitigating the dust nuisance, and was otherwise a reasonable improvement connected with the maintenance and repair of the street and that the County Council duly required or authorized or approved of the same and agreed to pay the cost thereof: and that the defendants acted in performance of their statutory duty. Alternatively, that tar-spraying was a reasonable and proper exercise of power in the performance of their duty as highway authority; (C) that the material used was such as is customarily used by road authorities and that all reasonable precautions were taken by the defendants against the flow of the material from the surface of the road; (D) that a failure (if any) after the tar spraying was completed to prevent the flow of the material from the surface of the road (if any) amounted to non-feasance only on their part.

Disturnal K.C. and *Craig Henderson* for the plaintiffs. The facts proved—quite apart from the scientific evidence—show that the beds into which this water passes were injuriously affected by the tar acid in the road water. The Public Health Act, 1875, s. 17, is intended to cover a case of this kind, in which the purity and quality of the water is affected. By the Development and Road Improvement Funds Act, 1909, the

Road Board was created with power to make advances to local authorities for improvements. The "treatment of a road for mitigating the nuisance of dust" is recognized as an improvement in that Act, s. 8, sub-s. 5, but that does not give the defendants authority to use tar-spray. If there is such authority the power is permissive only, and is to be exercised in conformity with private rights: *Metropolitan Asylum District* v. *Hill* (1) and *Canadian Pacific Ry. Co.* v. *Parke*. (2) The present case is even stronger than those cited, for here the defendants carried out the work in a way which was bound to produce a nuisance. The restrictions in s. 17 of the Public Health Act, 1875, must be observed by the local authority and "sewage or filthy water" may not be discharged: *Durrant* v. *Branksome Urban Council*. (3)

Sect. 308 of the Public Health Act, 1875, which provides for compensation under the Act, does not take away the right of the plaintiffs to restrain the defendants from allowing the tar-polluted water to drain in this way: *West* v. *Bristol Tramways Co.* (4) The burden is on the defendants to show that they could not carry out the work without causing the plaintiffs an injury, even assuming that statutory authority exists. They knew that as soon as frost and snow came the acid in the tar would escape, and they are liable on the principle of *Fletcher* v. *Rylands*. (5)

Macmorran K.C. and *Joshua Scholefield* for the defendants. The urban authority is empowered by ss. 144 and 149 of the Public Health Act, 1875, as surveyors of highways to "pave" and "repair" roads. By the Public Health Acts Amendment Act, 1890, s. 11, sub-s. 2, "tar-paving" is recognized as a mode of paving within the Public Health Acts. The Development and Road Improvement Funds Act, 1909, empowers the Road Board to make advances, and in their circular letter (July, 1910) the Road Board state that special consideration will be given (inter alia) to proposals "dealing with surfacing material treated with tar." There is no

(1) (1881) 6 App. Cas. 193.
(2) [1899] A. C. 535.
(3) [1897] 2 Ch. 291.
(4) [1908] 2 K. B. 14.
(5) (1866) L. R. 1 Ex. 265; (1868) L. R. 3 H. L. 330.

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suggestion here that the work was improperly done and *Metropolitan Asylum District* v. *Hill* (1) is distinguishable on the facts. The plaintiffs cannot here succeed unless the defendants have acted negligently, which is not suggested. In *West* v. *Bristol Tramways Co.* (4), there were alternative methods which could have been adopted; but that was not the case here, tar-spray being the only remedy for dust nuisance. This is not a case of misfeasance, for which alone the defendants would be liable. As regards s. 17 of the Public Health Act, 1875, that section is dealing with "sewers." It is true that a "sewer" cannot be so constructed as to foul a watercourse; but given an existing sewer, the mere fact that the road is tar sprayed does not make the drainage of the road illegal. Unless the road water were drained into the sea there is no other outlet.

Disturnal K.C. in reply.

Cur. adv. vult.

May 13. SALTER J. read the following judgment: The plaintiff is the owner and occupier of a watercress bed at Chesham in the county of Buckinghamshire, known as the Mill Pond Bed. She is also the occupier of an adjacent bed, known as Hills Bed. A road known at this point as Red Lion Street passes near these beds. It is a main road retained by the defendants under s. 11, sub-s. 2, of the Local Government Act, 1888 (51 & 52 Vict. c. 41). Surface water from Red Lion Street drained into both beds and through them into the river Chess. The Mill Pond Bed was converted from an old mill pond about forty years ago. Road water from Red Lion Street drained into the old mill pond and continued to drain into the Mill Pond Bed after the conversion. The defendants have thus a prescriptive right to drain the road water into that bed. The drainage from the road into the Hills Bed was made some years ago, but no prescriptive right to drain into that bed was shown.

Red Lion Street carries a considerable motor traffic. For some years there had been complaints of a dust nuisance,

and the defendants had considered the expediency of tar paving or tar spraying the road. On the advice of their then surveyor they had rejected this proposal, and their reason or one of their reasons was undoubtedly a fear that damage might be thereby caused to the watercress in the beds and to the fishing in the river. In 1919, on the advice of a new surveyor, this policy was changed, and Red Lion Street was tar sprayed in the latter part of May. The effect of this was that some of the road water draining into both beds came from the tarred portion of Red Lion Street. No perceptible damage was done to the bed until November. Between November 11 and 19 there was frost and snow, followed by thaw and rain. On November 19 the plaintiff's foreman observed that the watercress in the Mill Pond Bed had been seriously damaged, and shortly afterwards similar damage was observed in Hills Bed. The leaves of the plants were withered and discoloured, the roots are described by witnesses as "burnt" and "rotten," and they were clogged by oily black mud, considerable quantities of which were found in that portion of the Mill Pond Bed which is traversed by the road water. The damaged part of this bed was resown, but the new plants were almost immediately damaged and destroyed in a similar manner.

The plaintiff alleges that this damage was caused by the defendants, and she claims an injunction and damages. The defendants deny that they caused the damage: in the alternative they rely on their statutory powers.

There are other watercress beds near those already described. Some of these take road water from the tarred part of Red Lion Street, others do not. Every bed which took this water was damaged in the same manner and at the same time as the Mill Pond Bed and the Hills Bed. The others were entirely unaffected. The damage to the Mill Pond Bed was confined to the channel down which the road water flows: the rest of the bed was uninjured. Moreover another bed (marked G on the plan), which is traversed by the road water at one end, sustained injury at that end only, the rest of the bed being unaffected. On these facts it is plain, and it was

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not disputed that the damage to the watercress was caused by the road water. The question is, what property of the road water injured the watercress? The plaintiff's theory was that the damage was caused by tar acids in the road water. The defendants suggested that the temperature of the road water was the cause of the damage. [The evidence was then considered, and after a finding that the damage was caused by the tar acid in the road water the judgment continued:] It is admitted that this is a trespass at common law and that the defendants must show a statutory right to do what they have done. The right shown must be not merely a right to tar spray the road, but a right to discharge noxious water into the plaintiff's watercress beds. The defendants have power under ss. 15, 16 and 17 of the Public Health Act, 1875 (1), to discharge surface water into both these beds subject to the restrictions of s. 17: *Durrant* v. *Branksome Urban Council.* (2) In my opinion s. 17 applies here and prevents the defendants from relying on their surface drainage powers. The section is not, as I think, to be narrowly confined to sewage in the strict sense of the word. It forbids the introduction of sewage or filthy water, it distinguishes that which is noxious from that which is foul, and it indicates an intention to protect "the purity and quality of the water." I think that this road water, when

(1) Public Health Act, 1875 (38 & 39 Vict. c. 55). Sect. 15: "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act."

Sect. 16: "Any local authority may carry any sewer through across or under any turnpike road, or any street . . . . and after giving reasonable notice in writing to the owner or occupier (if on the report of the surveyor it appears necessary) into through or under any lands whatsoever within their district. They may also . . . . exercise all or any of the powers given by this section without their district for the purpose of outfall or distribution of sewage."

Sect. 17: "Nothing in this Act shall authorise any local authority to make or use any sewer drain or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse, or into any canal pond or lake until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in such stream or watercourse or in such canal pond or lake."

(2) [1897] 2 Ch. 291.

charged with large quantities of black and oily mud as described in the evidence, was "filthy water" within the section, and that this filthy water, containing as it did enough tar acid to injure and destroy the watercress, was noxious matter such as would affect or deteriorate the purity and quality of the water.

The defendants relied mainly, if not entirely, on their power to tar the road. Their case was that they had power to do this, that they exercised the power properly and carefully, and that the damage complained of was a necessary consequence of the careful exercise of the power. I am satisfied that a dust nuisance existed prejudicial to the public comfort and even, to some extent, to the public health. Tar macadam was unobtainable. The only way to deal with the nuisance was by tar spraying the road. The public interest required that the road should be tar sprayed, and the work was done with due care. In these circumstances I have no doubt that the defendants had, at the least, a power to tar spray the road. It was then urged for the plaintiff that this was a discretionary power and did not justify interference with the rights of others. The power is given to a public body to execute works for the public benefit, and provision is made for compensation. If it be necessary to decide this point I hold that no action could be brought for damage which is a necessary consequence of the due and careful exercise of the power: *Boulton* v. *Crowther*. (1)

But however wide the power—and even if the defendants were not only empowered but directed to tar spray the road—they cannot justify the damage to the plaintiff's property unless they show that such damage is a necessary consequence of the exercise of the power, or the discharge of the duty. The pouring of noxious matter into the plaintiff's watercress beds is not expressly authorized, and it is not impliedly authorized unless it is damage not practically avoidable in doing what is expressly authorized. This is for the defendants to prove, and they completely failed—indeed, they hardly attempted—to prove it either by questions to their surveyor

(1) (1824) 2 B. & C. 703.

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and other road experts or by cross-examination of the plaintiff's witnesses. It was proved to my satisfaction that it is a necessary result of tar spraying that the road water may become, in certain weather conditions, dangerously charged with tar acids. But it was not shown to be a necessary result of tar spraying this road that noxious matter must be discharged into the plaintiff's watercress beds. The river is close by. The road water is passed into the river through the plaintiff's beds. But the defendants made no attempt to prove that the water could not be taken to the river without passing it through the plaintiff's beds. In my opinion, the defence fails on this point, and the plaintiff is entitled to an injunction and damages, to be determined, unless agreed, by a referee.

[The plaintiff waived her right to an injunction and his Lordship then made a declaration in the following terms: "The plaintiffs being willing to take a declaration instead of an injunction declare that the defendants are not entitled to cause or allow surface water charged with or containing tar or other chemicals or chemical products noxious or harmful to watercress to flow or be discharged or carried into the plaintiff's said watercress beds."]

Judgment accordingly.

Solicitors for plaintiff: *Beaumont, Son & Rigden, for Simpson & Scott, Chesham.*

Solicitors for defendants: *Long & Gardiner, for W. J. Standring, Chesham.*

F. P. F.

J. ARON AND COMPANY (INCORPORATED) *v.* COMPTOIR WEGIMONT.

1921
June 21, 30.

Sale of Goods—C.i.f. Terms—"Shipment" within stipulated Month—Goods delivered at Docks for Purpose of Shipment—Delay in actual Shipment—"Description" of Goods—Time of Shipment a Condition Precedent.

A contract for the sale of goods c.i.f. Antwerp provided for "shipment by steamer and/or steamers . . . . from U.S.A. ports during October," 1919, and it contained a clause that "whatever the difference of the shipment may be in value from the grade, type or description specified, it is understood that any such question shall not . . . . entitle the buyers to reject the delivery or any part thereof, nor to refuse payment of the draft or drafts, nor to cancel any letters of credit," but should be determined by arbitration.

In October, 1919, the sellers delivered the goods at a dock in New York to the agents of a ship for the purpose of shipment and obtained a receipt stating that the goods were received for a named steamship. Owing to a strike the goods were not shipped on that vessel and were not in fact put on board another vessel till November, which then sailed and duly reached Antwerp with the goods. The buyers having rejected the documents tendered by the sellers:—

Held, (1.) that the buyers were entitled to reject the tender as the goods had not been "shipped" in October; and (2.) that the clause providing that the buyers should not be entitled to reject delivery on account of difference in value "from the grade, type or description specified" had no application, the words "grade, type or description" having reference only to the goods themselves as articles of commerce, and not to the non-fulfilment of a specific provision in the contract as to the time of shipment.

An express requirement of a contract that goods shall be shipped at a particular time is not a mere description of the goods, but is a condition precedent.

AWARD in the form of a special case.

The following statement of facts is taken from the judgment: "The sellers are J. Aron & Co. (Incorporated), of New York, and the buyers are the Comptoir Wegimont of Antwerp. The written contract is dated October 9, 1919; it relates to the sale of twenty tons of cocoa powder. It was a c.i.f. contract made in London. The following are the material words of the bargain: 'Price, 150*s*. per cwt. c.i.f. Antwerp; Shipment: by steamer and/or steamers direct and/or indirect from U.S.A. ports during October, advised as already shipped on *S.S. Idaho* (no sale if steamer lost).

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Subject always to U.S.A. Government export regulations. Any alteration of import or export regulations to be for buyers' account. Payment: buyers guarantee payment net cash for full invoice amount against shipping documents or delivery order upon presentation in Antwerp by cheque on approved London Bankers. Any dispute . . . . to be settled by arbitration in London. Subject to conditions stipulated on the back hereof.' The only relevant condition is this: 'Whatever the difference of the shipment may be in value from the grade, type or description specified, it is understood that any such question arising shall not in any case entitle the buyer to reject the delivery or any part thereof, nor to refuse payment of the draft or drafts, nor to cancel any letters of credit which have been opened. All such questions shall be determined by the arbitration provided for on reverse side of this contract. Notification of any claims for inferiority, difference in quality or any other claims for allowance to be made within fifteen days after steamer's arrival.' There is also a strike clause. I need not cite it, because it was agreed before me that it did not extend the time for shipment, but merely relieved the sellers from liability to pay damages if, owing to a strike, they were unable to perform their contract.

"The contract of October 9, 1919, was preceded by two telegrams both of October 7, 1919. The first (from sellers to buyers) offered cocoa powder to buyers c.i.f. Antwerp, 'shipment immediate, steamer now loaded.' The second (from buyers to sellers) was this: 'Comptoir Wegimont will take 20 tons Cocoa powder from the 44 tons offered, shipment immediately on steamer loaded, payment as proposed at offered price.'

"The buyers rejected the documents tendered by the sellers.

"The facts are not very clearly stated in the award; it is agreed, however, that they are these: The sellers were prevented through a strike of longshoremen and others from actually shipping the goods on board the steamship *Idaho* or any other steamship in October. They had, however, delivered the goods to a dock on October 8, 1919, and they

received a receipt which (so far as material) is as follows: 'New York October 8 1919. Cargo received for steamship *Idaho* on account J. Aron & Co. 772 cases cocoa powder.' Signed 'Frank Williams, receiving clerk.' Frank Williams was apparently the receiving clerk for that vessel. Indorsed on the back of that receipt is this: 'Receipt was issued for *Idaho* but as cargo was not forwarded per this steamer but by *Galileo* receipt was changed as for *Galileo* for record purposes.' Signed 'Sanderson & Son, agents.' The goods were in fact shipped on board the *Galileo* in the month of November, 1919. That ship duly reached Antwerp with the goods on board. Amongst the documents tendered to the buyers was what I will call for convenience a bill of lading dated October 22, 1919. So far as material, it was in these words: 'Received in apparent good order and condition from J. Aron & Co. (Incorporated) to be transported by the good steamship *Idaho* and/or following steamer now lying in the port of New York and bound for Antwerp with liberty to call at Gravesend or at any port or ports in or out of the customary route, or, failing shipment by said steamer, in and upon a following steamer, and to carry livestock and/or cargo on deck. 200 cases cocoa powder.' Signed by Sanderson & Son for the master dated October 22, 1919.

"It is found by the umpire that this document (which the buyers contend was not a bill of lading within the contract) was in the form now customary at the port of New York. The umpire further says that it is usual for the shipowners or their agents at New York to indorse on the bill of lading in the customary form a memorandum stating the date of actual shipment if asked by the shippers to do so, and if it is possible to state the date."

van den Berg for the sellers.
Schiller K.C. and *Hilbery* for the buyers.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

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June 30. McCARDIE J. read his judgment which, after stating the facts set out above, continued as follows: I take in order the questions argued before me. The first was this —namely, whether the goods were "shipped" in October. Mr. van den Berg for the sellers vigorously argued that shipment in October had actually taken place by reason of delivery at the dock to the agents of the ship in the manner I have stated. The bill of lading—I use the phrase for convenience—is, as I have said, dated October 22, 1919.

In *Bowes* v. *Shand* (1) Lord Blackburn said (2): "The bill of lading would be strong, and in most cases conclusive evidence, of the date when the shipment was really completed." No doubt this was so in 1877, but in view of the changed conditions of recent years I doubt whether the date on a bill of lading is now anything more than prima facie evidence of date of shipment. However that may be, it is of course clear that any inference arising from the date of the bill of lading can be displaced by proof or admission of the actual facts. In *In re General Trading Co. and Van Stolk's Commissiehandel* (3) A. T. Lawrence J. said: "If the bill of lading bears the contract date, but the shipment is not in accordance with the contract, the proof of date afforded by the bill of lading may be displaced by evidence." Here the actual facts are not in dispute.

In my opinion those facts do not show "shipment" in October, 1919, as required by the contract. Delivery at docks to the agents of a ship for the purpose of future shipment is not the same thing as an actual shipment on board. I think that this case is covered by the opinions of the House of Lords in *Bowes* v. *Shand*. (1) There the contract provided that the rice sold was to be shipped during the months of March and/or April. Lord Cairns said (4): "Prima facie, I should say it meant that the shipment must be made, that the rice must be put on board, during the two specified months." Later he said (5): "What is sold is not 300 tons

(1) (1877) 2 App. Cas. 455.
(2) Ibid. 482.
(3) (1911) 16 Com. Cas. 95, 101.
(4) 2 App. Cas. 464.
(5) Ibid. 468.

of rice in gross or in general. It is 300 tons of Madras rice to be put on board at Madras during the particular months." Lord Hatherley said (1): "I read the contract therefore as if it said 'put on board at Madras, or coast, for this port during the months of March and/or April, 1874.'" Equally clear opinions were expressed by Lord O'Hagan, Lord Blackburn and Lord Gordon. I am not aware of any authority which impairs the force or binding operation of those opinions. It follows then that as the goods here were not in fact shipped on board in October, 1919, the buyers were prima facie entitled to reject the documents and goods.

Mr. van den Berg, however, contended that this prima facie right was negatived by the clause in the contract providing that: "Whatever the difference of the shipment may be in value from the grade, type or description specified, it is understood that any such question arising shall not in any case entitle the buyers to reject the delivery," etc. He argued that the buyers should have taken up the documents and then asked for such allowance as they might be entitled to. It is of course well settled that payment for the documents does not preclude a right subsequently to reject or to claim damages in respect of the goods if they do not conform to the contract: see per Kennedy J. in *Polenghi Bros.* v. *Dried Milk Co.* (2) and per Hamilton J. and Kennedy L.J. in *Biddell Bros.* v. *E. Clemens Horst Co.* (3)

The question here is whether this allowance clause has any application to a case where the goods are not shipped at the specified contract time. The material words are "grade, type or description specified." The words "grade or type" admittedly and clearly do not apply here. The question is as to the word "description." Mr. van den Berg referred to the following passage in Benjamin on Sale, 6th ed., p. 675: "Mercantile contracts of sale often contain a stipulation that goods are to be shipped within or during a certain time. It is then a condition precedent that the goods shall be so shipped, the time of shipment forming part of the

(1) 2 App. Cas. 473. (2) (1904) 10 Com. Cas. 42.
(3) [1911] 1 K. B. 214, 221, 960.

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description of the goods." I agree that in one sense the time of shipment is part of the description of the goods. Indeed in *Bowes* v. *Shand* (1) Lord Cairns said: "That is part of the description of the subject matter of what is sold." So it is, I agree, in one sense, but in my humble view the express requirement of a contract that goods shall be shipped at a particular period is a good deal more than a mere description of the goods within s. 13 of the Sale of Goods Act, 1893; it is an express term of the contract independent of that which is generally known as the description of the goods. It is, I think, a condition precedent, as stated in the passage I have cited from Benjamin on Sale, that the goods shall be shipped as required by the contract. The duty of an ordinary c.i.f. vendor is first to get together goods of the contract description and then to ship them as required by the bargain. This is clearly put by Hamilton J. in *Biddell's Case* (2) where he says of a c.i.f. contract that "a seller under a contract of sale containing such terms has firstly to ship at the port of shipment goods of the description contained in the contract; secondly to procure a contract of affreightment," etc. Here the word "description" is, I respectfully think, used in the true sense by Hamilton J. See, too, the lucid statement by Lord Birkenhead in *Johnson* v. *Taylor Bros. & Co.* (3) where, speaking of the duties of a vendor under a c.i.f. contract, he says: "He is bound in the first place to ship goods of the contract description on board a ship bound to the contract destination." I may also usefully refer to an American case: *Norrington* v. *Wright* (4), cited at p. 679 of Benjamin on Sale, where Gray J. said that in mercantile contracts "a statement descriptive of the subject matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent." Here again I think that that learned American judge is using language in its correct and usual sense.

(1) 2 App. Cas. 455, 468.
(2) [1911] 1 K. B. 214, 220.
(3) [1920] A. C. 144, 149.
(4) (1885) 115 U. S. 188, 203.

I hold that a contract requirement that goods are to be shipped at a given time is far more than a mere description of the goods. I hold that it is a condition precedent: see s. 11, sub-s. 1 (*b*), of the Sale of Goods Act, 1893. I respectfully agree with A. T. Lawrence J. in *In re General Trading Co. and Van Stolk's Commissiehandel* (1), when he said: "It is admitted by Mr. Maurice Hill that he cannot dispute that shipment in the stipulated month is a condition. That was decided long ago when commerce was not so complicated as it is now." I may add that the statement by Hamilton J. in *Biddell's Case* (2) is powerfully amplified by Scrutton J. in *Landauer & Co.* v. *Craven.* (3)

I therefore hold that the allowance clause before me does not apply to the facts of this case. It applies only to the grade, type, or description of the goods themselves as actual articles of commerce, and not to the non-fulfilment of a specific condition in the contract as to the month in which the goods shall be shipped. The limited operation of even a broadly worded allowance clause is strikingly shown by the judgment of Bigham J. in *Vigers Bros.* v. *Sanderson Bros.* (4) I do not think that the parties ever meant the clause to apply to the facts before me. The whole wording of the clause indicates that it was inserted alio intuitu. If a vendor desires to escape from his ordinary contractual liabilities he must use plain and apt words. As Lord Macnaghten said in *Elderslie Steamship Co.* v. *Borthwick* (5), "an ambiguous document is no protection." I am satisfied that the buyers were entitled to reject the documents and goods tendered to them.

There is, I think, another ground on which the buyers can succeed. The contract of sale says "advised as already shipped on s.s. *Idaho.*" In construing those words I am entitled to consider the telegrams between the parties of October 7, 1919, as being part of the surrounding circumstances: see *Bank of New Zealand* v. *Simpson.* (6) I

(1) 16 Com. Cas. 95, 101.
(2) [1911] 1 K. B. 214, 220.
(3) [1912] 2 K. B. 94, 105.
(4) [1901] 1 Q. B. 608.
(5) [1905] A. C. 93, 96.
(6) [1900] A. C. 182

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am also entitled to consider them in order to ascertain the subject matter of the contract. As a result I come to the view that the subject matter sold and bought was twenty tons of cocoa powder actually on board the steamship *Idaho* at the date of the contract. The words "advised as already shipped on s.s. *Idaho*" amount, moreover, to an express warranty in the nature of a condition precedent that the goods were then on board the *Idaho*. I hold that such a condition falls within the principle of *Behn* v. *Burness* (1): see, too, s. 11, sub-s. 1 (*b*), of the Sale of Goods Act, 1893. Here the condition was broken by the sellers. They could not properly tender goods on board the *Galileo* as fulfilment of a contract for the sale of goods on board the *Idaho*. The allowance clause cannot cover such a state of things as that. For the above further reason I hold that the buyers are right.

In view of the points I have already dealt with it becomes unnecessary to consider in this case the serious question as to the form and nature and effect of the bill of lading required by such a contract as that now before me. I deal with that point in the case of *Diamond Alkali Export Corporation* v. *Bourgeois*. (2) I therefore find in favour of the buyers with the results indicated in the award. The sellers must pay the costs of the proceedings before me.

Judgment for buyers.

Solicitors for sellers: *Waltons & Co.*
Solicitors for buyers: *Henry Hilbery & Son.*

(1) (1863) 3 B. & S. 751. (2) See next case.

J. S. H.

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Sale of Goods—C.i.f. Contract—Cash against Documents—Bill of Lading—Acknowledgment of Shipment—Certificate of Insurance—Tender of Certificate in Lieu of Policy—Buyer's Right to reject—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *ss.* 21, 22, 50 (*sub-s.* 3), 90.

Under a contract for the sale of goods to be shipped from American seaboard c.i.f. Gothenburg, the sellers tendered, with an invoice for the goods, (*a*) a document purporting to be a bill of lading, in the following form: "Received in apparent good order and condition from D. A. Horan to be transported by the S.S. *Anglia* now lying in the Port of Philadelphia . . . . or failing shipment by said steamer in and upon a following steamer, 280 bags Dense Soda," and (*b*) a certificate of insurance issued by an American insurance corporation, which, as the certificate declared, "represents and takes the place of the policy and conveys all the rights of the signed policy holder . . . . as fully as if the property was covered by a special policy direct to the holder of this certificate":—

Held, that the buyers were entitled to reject upon the ground that proper documents had not been tendered by the sellers in conformity with the contract; for document (*a*) did not acknowledge shipment, and was therefore not a bill of lading within the c.i.f. contract, and as to (*b*), a document of insurance is not good tender in England under an ordinary c.i.f. contract unless it be an actual policy, and unless it falls within the provisions of the Marine Insurance Act, 1906.

Marlborough Hill (*Ship*) v. *Cowan & Sons* [1921] 1 A. C. 444 commented upon and distinguished.

Dictum of Bailhache J. in *Wilson, Holgate & Co.* v. *Belgian Grain Co.* [1920] 2 K. B. 1, 7 considered.

AWARD in an arbitration stated in the form of a special case.

By a contract in writing dated August 7, 1920, the Diamond Alkali Export Corporation of New York agreed to sell to Fl. Bourgeois of Great St. Helens in the City of London, 50 tons of soda ash for September/October shipment from American seaboard at $4.70 per hundred pounds c.i.f. Gothenburg. Terms of payment were cash against documents under confirmed banker's credit at London.

Among the conditions contained in the contract was the following: "Seller not liable for failures or delays in delivery due to strikes, lockouts, fire, accident, embargoes, stoppage of navigation, lack of transportation, war restrictions or seizures by any governmental agency or any contingencies

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whatever beyond seller's control. In case any deliveries are delayed owing to any such contingency, the delayed shipments shall be made as soon as possible after such contingency has been removed or such shipments may be cancelled at seller's option. Date of bill of lading is to be considered date of payment."

The sellers arranged for the goods to be carried in the Swedish steamship *Anglia*, which was originally scheduled to leave Philadelphia for Gothenburg on October 13, 1920, and obtained the necessary permit for shipment from the Traffic Control Manager in New York. The date of sailing was, however, delayed, and the date of the bill of lading which, according to the contract, was to be considered the date of shipment, was November 8, 1920. This delay arose from causes which were, as the arbitrator found, beyond the seller's control.

The original documents were tendered in London with an invoice for the goods to the buyer on November 24, 1920. The documents were rejected by the buyers and payment was refused on the grounds (1.) that the sellers had not shipped the goods until November 8 and 9, 1920 : (2.) that a proper bill of lading was not presented, the goods being described in the document presented to the buyers as "received in apparent good order and condition to be transported by the S.S. *Anglia*" instead of as "shipped per S.S. *Anglia*": (3.) that a proper policy of insurance was not presented them, but a document described as a "certificate of insurance."

As to (1.) the sellers contended that the non-shipment of the goods in September/October, 1920, was met by the above strike clause in the contract.

The questions for the opinion of the Court were (1.) whether the "strike clause" applied, and (2.) whether under the contract, and according to the law of England, the documents presented by sellers—namely, the bill of lading and certificate of insurance—were, together with the invoice for the goods, valid and sufficient to entitle sellers to payment of the price. It was admitted that these points were

to be decided according to English law and the award so stated.

The arbitrator made an alternative award to meet the decision of the Court, according as it should be in favour of the sellers or the buyers. The terms of the documents and the arguments are sufficiently set out in the judgment.

Patrick Hastings K.C. and *Lord Tiverton* for the sellers.

J. A. Compston K.C., *Simner* and *Kenelm Preedy* for the buyers.

Cur. adv. vult.

July 1. McCARDIE J. read a judgment which, after stating the facts, continued: I shall not narrate the circumstances whereby (as is admitted) the goods were not shipped on board until November 8 and 9, 1920. The facts fall, I think, within the strike clause. The arbitrators state that the delay was at all times beyond the seller's control. The strike clause is very broadly worded. It is not confined to prevention. It refers to delay also. The words, "or any contingencies whatever," seem to exclude the operation of the ejusdem generis rule. See, for example, *Larsen* v. *Sylvester & Co.* (1) and *Travers* v. *Cooper & Sons.* (2)

That being so the next question is whether the effect of the strike clause was merely to save the sellers from liability, or whether it operated also to debar the buyers from insisting that the goods had not been shipped in the months specified in the contract.

Upon the whole I think that the effect of the clause was to enable the seller (if facts within the strike clause prevented shipment in September–October) to ship at a later date. I am not aware of any direct authority on the point. The case of *Brown* v. *Turner, Brightman & Co.* (3) and the like decisions do not really touch the point. The decision in *Brooke Tool Manufacturing Co.* v. *Hydraulic Gears Co.* (4) turned upon different considerations. The clause must be read in a fair

(1) [1908] A. C. 295.
(2) [1915] 1 K. B. 73.
(3) [1912] A. C. 12.
(4) [1919] 122 L. T. 126.

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business sense. It effects two things, I think. It firstly saves the vendor from liability for delay, etc., caused by circumstances within the clause; and, secondly, it enables the seller, as a matter of right, to ship as soon as possible after the cause of delay has ceased to operate. It gives power to the seller to cancel. It gives no like power to the buyer.

In the case of *J. Aron & Co.* v. *Comptoir Wegimont* (1) I yesterday stated my views on the meaning and contractual effects of a condition for shipment at a specified time. I do not repeat them further than to say that shipment, in my opinion, means shipment on board. Here an express clause of the bargain enables the sellers as a matter of right to ship at a later date than that expressed in the earlier part of the contract of sale. I therefore find in favour of the sellers on the first objection of the buyers.

It thus becomes my duty to consider the serious and powerfully argued contention of the buyers, that the documents tendered did not conform to the contract. I will deal with those documents separately. It is admitted that the points are to be decided by English law and the award so states. I take first what I will call for convenience the bill of lading. That document was issued by the Swedish America Mexico Line, Ld., of Gothenburg, Sweden. It is dated November 8, 1920. It contains many clauses. The arguments before me turned on the earlier words of the bill of lading, and those only I set out. They are these: "Received in apparent good order and condition from D. A. Horan to be transported by the S.S. *Anglia* now lying in the port of Philadelphia and bound for Gothenburg, Sweden, with liberty to call at any port or ports in or out of the customary route or failing shipment by said steamer in and upon a following steamer, 280 bags Dense Soda." Perhaps I should add that the first of the many clauses in the bill of lading is this: "It is mutually agreed that this shipment is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States approved

(1) Ante, p. 435.

on the 13th day of February, 1893, and entitled 'An Act for the navigation of vessels.'" This Act of 1893 provides by s. 4: "That it shall be the duty of the owner or owners, master or masters or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading or shipping document stating, amongst other things, the marks necessary for identification, number of packages or quantity, stating whether it be the carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner master or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described." I call attention to the words "bill of lading or shipping document." The Act recognizes that there may be shipping documents fulfilling the requirements of the section and yet not bills of lading.

Now the buyers strongly contend that the document here tendered was not a bill of lading at all, and that in any event it was not such a bill of lading as was required by the contract. They call attention to the fact that the document does not acknowledge the goods to have been actually placed on board. It merely says that the goods have been received "to be transported by the S.S. *Anglia*." They further call attention to the words "or failing shipment by said steamer in and upon a following steamer." I need scarcely say that I appreciate the vital nature of the buyer's contention, inasmuch as the form of document now before me is of frequent use at American ports. In order to test the matter it is necessary in the first place to consider the rights of a buyer under a c.i.f. contract. The strike clause here is a mere accident, and does not seem to affect the point at issue. For inasmuch as the duty of the vendors was to ship as soon as the contingency ceased to operate, and inasmuch as they were able to ship on November 8 and 9, 1920, it follows that the time of shipment under the contract was that date.

What then are a seller's duties and buyer's rights under a c.i.f. contract? They were stated by Lord Blackburn in

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Ireland v. *Livingston* (1), where he refers to a "bill of lading." So, too, the well-known judgment of Hamilton J. in *Biddell Brothers* v. *E. Clemens Horst Co.* (2), where he says: "It follows that against tender of these documents, the bill of lading, invoice, and policy of insurance, which completes delivery in accordance with that agreement, the buyer must be ready and willing to pay the price." So Kennedy L.J. says in his judgment in the same case in the Court of Appeal (3): "How is such a tender to be made of goods afloat under a c.i.f. contract? By tender of the bill of lading, accompanied in case the goods have been lost in transit by the policy of insurance. The bill of lading in law and fact represents the goods": see too the judgment of Scrutton J. in *Landauer & Co.* v. *Craven.* (4) The latest statement is the opinion of Lord Birkenhead in *Johnson* v. *Taylor Bros. & Co.* (5), where he says in speaking of the duties of a vendor under a c.i.f. contract: "He is bound in the second place to tender to the purchaser within a reasonable time after shipment the shipping documents, for example, the bill or bills of lading and a policy of insurance reasonably covering the value of the goods." I should mention also the notes to Scrutton on Charterparties, 10th ed., Art. 59. If then a vendor under an ordinary c.i.f. contract is bound to tender a bill of lading, the question next arising is: What is meant by a bill of lading within such a contract?

The contract decides the rights of the buyer. The question is not as to the meaning of the phrase in a particular Act of Parliament or as to the possible meaning under other forms of contract. Nor is it material that a buyer objects to the document for ulterior motives: see, for example, Lord Cairns' judgment in *Bowes* v. *Shand* (6) and Lord Hatherley's judgment in the same case. A buyer, as these noble Lords pointed out, is entitled to insist on the letter of his rights. As Lord Hatherley said: "If you seek to fasten upon him the engagement, you must first bring him"—the

(1) (1872) L. R. 5 H. L. 395, 406.
(2) [1911] 1 K. B. 214, 221.
(3) [1911] 1 K. B. 934, 956.
(4) [1912] 2 K. B. 94, 107.
(5) [1920] A. C. 144, 149.
(6) (1877) 2 App. Cas. 455, 465, 476.

buyer—" within the four corners of the contract." A buyer, moreover, may have obvious business reasons for so insisting, as he may have to implement his own bargain with rigorous subvendees. Now I consider that the phrase " bill of lading " as used with respect to a c.i.f. contract means a bill of lading in the sense established by a long line of legal decisions. Unless this meaning be given the matter is thrown into confusion.

In Art. 3 of Scrutton on Charterparties, 10th ed., is a definition which says : " A bill of lading is a receipt for goods shipped on board a ship signed by the person who contracts to carry them or his agent and stating the terms on which the goods were delivered to and received by the ship." This statement suggests at once an obvious and serious distinction between a receipt for goods actually shipped on board a particular ship and a receipt for goods which are at some future time to be shipped on board either a particular ship or an unnamed ship to follow her. The business distinction and varying results of the two seem to me to be plain. The legal distinction seems to me to be equally plain.

From the earliest times a bill of lading was a document which acknowledged actual shipment on board a particular ship. In Bennett's History of the Bill of Lading (Cambridge Press, 1914), at p. 8, is this passage : " Desjardins says that towards the close of the 16th century the use of the Bill of Lading was widespread—he quotes a definition from Le Guidon de la mer, a document of that epoch, which defines the Bill of Lading as ' the acknowledgment which the master of the ship makes of the number and quality of the goods loaded on board ' " : see Desjardin's Traité de Droit Commercial Maritime, Tome 4, Art. 904 (Paris, 1885). It is clear, I may add, that the bill of lading sprang from the ship's book of lading, which was a document of recognized importance showing the goods actually put on board.

The famous case of *Lickbarrow* v. *Mason* (1) was decided in 1794. It decided that bills of lading were transferable by the custom of merchants. The finding of the jury as to the custom is set out as follows : It begins : " By the custom

(1) (1794) T. R. 685.

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of merchants, bills of lading, expressing goods or merchandises to have been shipped by any person or persons to be delivered to order or assigns, have been, and are, at any time after such goods have been shipped, and before the voyage performed, for which they have been or are shipped, negotiable and transferable by the shipper or shippers of such goods." The word "negotiable" in that special verdict really means no more than the word "transferable" or "assignable": see Scrutton on Charterparties, Art. 56 (note).

I am not aware of any decision which has modified the finding of the jury in *Lickbarrow* v. *Mason* (1) as to the subject-matter to which alone the custom of transferability applied. Apparently that custom, and that custom only, was operative when the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), was passed. Now that Act expressly recites the custom found in *Lickbarrow* v. *Mason* (1), and then proceeds: "And whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board." It thus seems plain that the Act was referring to documents acknowledging an actual shipment on board a specified ship. I need not refer to ss. 1 and 2 of the Act. But s. 3 says: "Every bill of lading in the hands of a consignee or endorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other persons signing the same." It seems clear that no assignee can invoke the benefits, for example, of s. 3 of the Act, unless the document actually asserts the goods to have been shipped on board.

The whole point of the section seems to go if the document does not contain such an assertion. I will refer to this Act later.

Now in Blackburn on Sale, 3rd ed. (1910), p. 421, is this statement. "A bill of lading is a writing signed on behalf of the owner of the ship in which goods are embarked, acknowledging the receipt of the goods, and undertaking to deliver them at the end of the voyage (subject to such conditions as

(1) (1794) T. R. 683, 685.

may be mentioned in the bill of lading)." The common form of a bill of lading is given in Carver on Carriage by Sea, 6th ed., Sect. 54. It is worthy of observation that in an American case, *Rowley* v. *Bigelow* (1), Shaw C.J. said: "The bill of lading acknowledges the goods to be on board and regularly the goods ought to be on board before the bill of lading is signed": see note (3.) in Parsons on Shipping (Boston), vol. i., p. 187, where the learned author somewhat pointedly says: "It is a fraud on the part of the Master to sign the bills before the goods are on board." In Benjamin on Sale, 6th ed., p. 846, is this passage, giving the result of the cases: "When delivery is to be made by a bill of lading the rule is that the seller makes a good delivery if he forward to the buyer, as soon as he reasonably can after the shipment, a bill of lading, whereunder the buyer can obtain delivery, duly indorsed and effectual to pass the property in the goods, made out in terms consistent with the contract of sale, and purporting to represent goods in accordance with the contract, and which are in fact in accordance therewith." Apart from any authority to the contrary it seems to me that I must hold that the document here is not a bill of lading within the c.i.f. contract before me. It does not acknowledge the goods to be on board a specific ship, nor does it acknowledge a shipment on board at all. It leaves it uncertain as to whether the goods will come by the *Anglia* or some following ship. The word "following" is loose and ambiguous in itself. The document does not even say "immediately following," nor does it indicate that the "following ship" will belong to or be under the control of the person who issues the bill of lading. The document seems to me to be (in substance) a mere receipt for goods which at some future time and by some uncertain vessel are to be shipped. It is not even in the form of the New York Produce Exchange bill of lading set out in Carver, 6th ed., Appendix A, p. 971. The buyer is left in doubt as to actual shipment and actual ship.

The sellers, however, submit that I am bound by the opinion of the Privy Council in *Marlborough Hill* (*Ship*)

(1) (1832) 12 Pick. 307 (Mass.).

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v. *Cowan & Sons.* (1) The buyers, on the other hand, contend that that opinion is erroneous and that I ought not to follow it. I need scarcely state the deep diffidence and embarrassment which I feel in discussing that weighty opinion. As Lord Phillimore himself, however, pointed out in *Dulieu* v. *White & Sons* (2), a Privy Council advice is not binding on the King's Bench Division even as to the res decisa. I wish to point out first that the actual decision in the *Marlborough Hill Case* (1) was merely that the bill of lading there in question (which closely resembles the one now before me) fell within s. 6 of the Admiralty Court Act, 1861. It may be that the phrase "bill of lading" in that section permits of a broad interpretation. I point out next that there is no express statement in the *Marlborough Hill Case* (1) that the document there in question actually fell within the Bills of Lading Act, 1855. In the third place it seems to me to be clear that the Board did not consider the nature and effect of an ordinary c.i.f. contract or the decisions thereon in relation to the question before them. The case of *Bowes* v. *Shand* (3) moreover was not even cited to the Board. Lord Phillimore, in reading the advice of the Privy Council, said (4): "There can be no difference in principle between the owner, master, or agent acknowledging that he has received the goods on his wharf, or allotted portion of quay, or his storehouse awaiting shipment, and his acknowledging that the goods have been actually put over the ship's rail." With the deepest respect I venture to think that there is a profound difference between the two, both from a legal and business point of view. Those differences seem to me clear. I need not state them. If the view of the Privy Council is carried to its logical conclusion, a mere receipt for goods at a dock warehouse for future shipment might well be called a bill of lading. Again the Board say (5): "Then as regards the obligation to carry either by the named ship or by some other vessel; it is a contract which both parties may well find it convenient to enter into and accept.

(1) [1921] 1 A. C. 444.
(2) [1901] 2 K. B. 669, 683.
(3) 2 App. Cas. 455.
(4) [1921] 1 A. C. 451.
(5) [1921] 1 A. C. 444, 452.

The liberty to tranship is ancient and well established, and does not derogate from the nature of a bill of lading, and if the contract begin when the goods are received on the wharf, substitution does not differ in principle from transhipment." I do not pause to analyse these words. I only say that in my own humble view substitution and the right of transhipment are distinct things, and rest on different principles. The passage last cited can, I think, have no application at all to a c.i.f. contract, which provides for a specific date of shipment. It will suffice if I say two things. First, that in my view the *Marlborough Hill Case* (1) does not apply to a c.i.f. contract such as that now before me. Secondly, that grounds for challenging the dicta of the Privy Council will be found in Art. 22, and the notes and cases there cited, in Scrutton on Charterparties, 10th ed., as to what are called "through bills of lading," in the lucid article in the Law Quarterly Review of October, 1889, vol. v., p. 424, by Mr. Bateson, K.C.; and of July, 1890, vol. vi., p. 289, by the late Mr. Carver, and in Carver on Carriage, 6th ed., notes to Sect. 107. I do not doubt that the document before me is a "shipping document" within the U.S.A. Harter Act, 1893. I feel bound to hold, however, that it is not a bill of lading within the c.i.f. contract of sale made between the present parties.

I now consider the second document discussed before me. The buyers contend that the "Certificate of Insurance" tendered by the sellers was not a policy of insurance within the c.i.f. contract. It is headed "Certificate of Insurance." It is No. 767,922. It is issued by the Firemen's Fund Insurance Company of San Francisco, a well-known office. The substantive words are these: "This is to certify that on the 8th of November, 1920, this Company insured under Policy No. 2,319 for D. A. Horan $5,790 on 280 bags 58 per cent. dense soda ash N. Y. & L. Test. valued at sum insured Shipped on board of the S.S. *Anglia* and/or other steamer or steamers at and from Philadelphia to Gothenburg. And it is hereby understood and agreed that in case of loss, such

(1) [1921] 1 A. C. 444.

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loss is payable to the order of the assured on surrender of this certificate. This certificate represents and takes the place of the policy and conveys all the rights of the original policy holder (for the purpose of collecting any loss or claims) as fully as if the property was covered by a special policy direct to the holder of this certificate and free from any liability for unpaid premiums. Not valid unless countersigned by D. A. Horan. (Signed) F. H. and C. Robson, Managers. Countersigned D. A. Horan." Notice: "To conform with the Revenue Laws of Great Britain in order to collect a claim under this certificate it must be stamped within 10 days after its receipt in the United Kingdom." On the front of the certificate are certain conditions, of which the first is this: "This certificate is subject to the full terms of the policy in respect of being free from claim in respect of capture, seizure, detention, or the consequences of hostilities." At the back of the certificate are other conditions which I need not detail. Is this certificate a proper policy of insurance within the c.i.f. contract here made? I have read, I believe, all the cases on the rights and obligations of buyer and seller under c.i.f. contracts from *Ireland* v. *Livingston* (1) and *Hickox* v. *Adam* (2) to *Johnson* v. *Taylor Bros. & Co.* (3) Many decisions are cited in Benjamin on Sale, vol. vi., pp. 850 et seq. In all the cases a "policy of insurance" is mentioned as an essential document. The law is settled and established. I may point out that in *Burstall* v. *Grimsdale* (4) it was expressly provided by the contract that a certificate of insurance might be an alternative for an actual policy. I ventured in *Manbre Saccharine Co.* v. *Corn Products Co.* (5) to discuss the relevant authorities, including the lucid judgment of Atkin J. in *C. Groom, Ld.* v. *Barber* (6)—a judgment which I have again most carefully read. It seems plain that a mere written statement by the sellers that they hold the buyers covered by insurance in respect of a specified policy of insurance is not itself a policy of insurance within a c.i.f. contract: see

(1) L. R. 5 H. L. 395.
(2) (1876) 34 L. T. 404.
(3) [1920] A. C. 144.
(4) (1906) 11 Com. Cas. 280.
(5) [1919] 1 K. B. 198.
(6) [1915] 1 K. B. 316.

the *Manbre Saccharine Case.* (1) It seems plain also that a broker's cover note or an ordinary certificate of insurance are not adequate agreements within such a contract: see Bailhache J. in *Wilson, Holgate & Co.* v. *Belgian Grain & Produce Co.* (2)

Does the present document fulfil the seller's contractual duty? In *Wilson, Holgate & Co.'s Case* (2) Bailhache J. said: "It must be borne in mind that, in dealing with certificates of insurance, I am not referring to American certificates of insurance which stand on a different footing and are equivalent to policies, being accepted in this country as policies." It will be observed that Bailhache J. used the word "accepted," he does not say that buyers are "bound to accept" them. The sellers here rely on that passage and also on the notes to Scrutton on Charterparties, 10th ed., p. 185, note (*e*), where it is said: "A certificate of insurance issued by an insurance company under a floating policy, upon which document the company can be sued, would suffice in any case." The buyer strongly challenges that view and his counsel require me to express an independent opinion on the point. I do so with the greatest diffidence and reluctance in view of the weight carried by even the dicta of such experienced and distinguished judges as Scrutton L.J. and Bailhache J. I feel bound to express my view, not upon a question of business convenience, but upon the strict law of the matter. I assume that this document (which is not stamped) was given under a floating policy issued by the insurance company to D. A. Horan. Now the certificate is not a policy. It does not purport to be a policy. This is conceded by Mr. Hastings in his able argument for the sellers. It is a certificate that a policy was issued to D. A. Horan, and it incorporates the terms of that policy. Those terms I do not know, nor is there anything before me to indicate that the buyers knew them. The certificate does not show whether that policy was in a recognized or usual form or not. The certificate does not therefore contain all the terms of the insurance. Those terms have to be sought for in two

(1) [1919] 1 K. B. 198. (2) [1920] 2 K. B. 1, 7.

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documents—namely, the original policy and the certificate. But even if this document is not a policy yet the sellers say it is "equivalent to a policy." In connection with that phrase it is well to quote from another part of the judgment of Bailhache J. in *Wilson, Holgate & Co.'s Case.* (1) He there says: "He"—the buyer—"cannot be compelled to take a document which is something like that which he has agreed to take. He is entitled to have a document of the very kind which he has agreed to take, or at least one which does not differ from it in any material respect." This leads me to ask whether the document before me differs in any material respect from a policy of insurance. To begin with, I do not see how the buyer here could know whether the document he got was of a proper character (one he was bound to accept) unless he saw the original policy, and examined its conditions, whether usual or otherwise. In the next place I feel that a certificate of insurance falls within a legal classification, if any, different to that of a policy of insurance. The latter is a well-known document with clearly defined features. It comes within definite, established and statutory legal rights. A certificate, however, is an ambiguous thing; it is unclassified and undefined by law; it is not even mentioned in Arnould on Marine Insurance. No rules have been laid down upon it. Would the buyer sue upon the certificate or upon the original policy plus the certificate? If he sued simply on the certificate he could put in a part only of the contract, for the other terms of the contract—namely, the conditions of the actual policy—would be contained in a document not in his control and to the possession of which he is not entitled. Thirdly, I point out that before the buyer could sue at all he would have to show that he was the assignee of the certificate: see Arnould, 9th. ed, ss. 175–177. In what way can he become the assignee? It is vital to remember the provisions of the Marine Insurance Act, 1906. Now the relevant statutory provision is s. 50, sub-s. 3, which says: "A marine policy may be assigned by endorsement thereon or in other customary manner." This sub-section, however,

(1) [1920] 2 K. B. 1, 9.

only applies, so far as I can see, to that which is an actual marine policy. Sect. 90, the interpretation clause, says: "In this Act unless the context or subject matter otherwise requires,—'policy' means a marine policy." The Act contains no reference, express or implied, to a certificate of insurance. Sect. 22 says: "Subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act." If, as is admitted, this document be a certificate only and not a policy, it therefore seems not even to be admissible in evidence before me. If the certificate does not fall within the Marine Insurance Act it appears to be only assignable if at all by writing in accordance with the provisions of the Judicature Act, 1873, s. 25, sub-s. 6. The certificate may have less legal effect than a slip, as to which see Arnould, s. 34, and the Marine Insurance Act, 1906, s. 21.

I mention these considerations briefly. Time does not permit to discuss them further and to develop their significance, or to emphasize the points arising under ss. 91–95 of the Stamp Act, 1891. In my view the Act of 1906 deals with marine policies only. It does not, I think, cover other documents, although they may be said to be the "business equivalent" of policies. I do not think that the Act of 1906 covers the document now before me. In my humble view a document of insurance is not a good tender in England under an ordinary c.i.f. contract unless it be an actual policy and unless it falls within the provisions of the Marine Insurance Act, 1906, as to assignment and otherwise. I must therefore hold that the buyers were entitled to reject the documents upon the ground that no proper bill of lading and no proper policy of insurance were tendered by the sellers in conformity with the c.i.f. contract. I abstain from amplifying this judgment by the citation of other authority or the mention of further reasons in support of the conclusions I have deemed it my duty to state.

It may well be that this decision is disturbing to business men. It is my duty, however, to state my view of the law without regard to mere questions of convenience. I desire

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to add four remarks: (1.) That there is no finding or evidence before me of any course of dealing between the parties. (2.) That there is no finding or evidence before me of any custom or general usage which modifies the long and clearly established legal rights of a buyer under a c.i.f. contract. If any such custom or usage be asserted then the point can be dealt with in some future action in the Commercial Court. Whether such an assertion can be proved may well be a question of doubt in view of the matters appearing in the *Manbre Saccharine Case* (1): see, too, *Wilson* v. *Holgate & Co.'s Case* (2), where Bailhache J. said: "I am not satisfied that since *Ireland* v. *Livingston* (3) was decided any custom has arisen which obviates the necessity for a tender by the seller of a policy of insurance if the buyer requires it." (3.) It may well be that legislation is needed to enlarge the operation of the Bills of Lading Act, 1855, and the Marine Insurance Act, 1906. (4.) It may be well also that the greater part of the difficulties indicated in this judgment can be easily, promptly and effectively met by the insertion of appropriate clauses in c.i.f. contracts.

For the reasons given I find in favour of the buyers with the results stated in the award. The sellers must pay the costs of the proceedings before me.

Appeal dismissed.

Solicitors for sellers: *Cosmo Cran & Co.*

Solicitors for buyers: *Swepstone, Stone, Barber & Ellis.*

(1) [1919] 1 K. B. 198, 206. (2) [1920] 2 K. B. 1, 8.
(3) L. R. 5 H. L. 395.

F. P. F.

SOCIÉTÉ DES HOTELS DU TOUQUET-PARIS-PLAGE *v.* CUMMING.

1921 *July* 14.

[1919. S. 2541.]

Contract—Breach—Liquidated Debt incurred Abroad—Rate of Exchange, applicable—Date for reckoning.

The defendant, an English subject, incurred a debt of Frs. 18,035 to the plaintiffs in France. The debt fell due on December 31, 1914, and its value at that date in sterling was 715*l.* In an action for recovery of this debt the defendant admitted the debt, but pleaded that her liability in sterling should be reckoned at the date of the judgment. Between the issue of the writ and the day of hearing the defendant paid Frs. 18,035 to the plaintiffs in France, and a receipt was given her as for money deposited :—

Held, that in arriving at the proper equivalent in English currency, the rate of exchange prevailing between the two countries on December 31, 1914, when the debt became due, and not that prevailing at the date of the judgment, should be adopted.

Action tried before Avory J.

The plaintiffs, a company incorporated in France, by specially indorsed writ dated November 1, 1919, claimed Frs. 18,035 due from the defendant for board and residence at the Hermitage Hotel, Le Touquet-Paris-Plage (Pas de Calais), and for money lent. The particulars of the claim were as follows :—

"To supplying board and residence to the defendant at the above hotel to August 4, 1914	7260 francs.	
To money lent by the plaintiffs to the defendant	10,775	,,
Total . . .	18,035	,,

The English equivalent of which on December 31, 1914, is 715*l.* 13*s.* 4*d.*"

On August 3, 1914, the defendant signed and handed to the manager of the Hermitage Hotel, Le Touquet, a document of the same date in which she admitted the debt and undertook to pay the plaintiffs at their address in cash "as soon

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as the European crisis permits, in any case before the end of the year."

A defence was delivered on February 2, 1920, by which the defendant again admitted the debt, but pleaded that her liability in sterling should be reckoned when judgment should be given in the action and not as at December 31, 1914. There was also a counterclaim by the defendant, but this was afterwards abandoned. On May 17, 1920, the defendant delivered a further defence, alleging that she had satisfied the claim by payment of Frs. 18,035 to the plaintiffs at Le Touquet on May 9, 1920. According to the evidence, the defendant had called at the Hermitage Hotel, Le Touquet, on May 9, 1920, and paid Frs. 18,035 to another manager who was not acquainted with the facts and who thereupon gave her a receipt for Frs. 18,035 as for money deposited with him.

It was agreed between the parties that the rates of exchange on the material dates were as follows: On July 30, 1914, Frs. 25.05 per 1*l.* sterling; on December 31, 1914, Frs. 25.05–07½ per 1*l.* sterling; and on May 9, 1920, Frs. 59.30–60 per 1*l.* sterling.

The action came on for hearing before Sankey J. on June 22, 1921, and his Lordship then directed certain evidence to be taken on commission. The adjourned hearing took place on July 14 before Avory J., the sole points in dispute being whether the debt was payable in English money at the rate of exchange prevailing on December 31, 1914, or at that prevailing on the date of judgment in the action, and secondly, whether the payment made on May 9, 1920, constituted accord and satisfaction of the debt.

Compston K.C. and *Frampton* (*Havers* with them) for the plaintiffs. The proper date at which the rate of exchange is to be taken is December 31, 1914, when the money was payable: *Di Ferdinando* v. *Simon Smits & Co.* (1) The plaintiffs are entitled to sue in an English Court and are therefore entitled to payment in English money as at that date.

(1) [1920] 2 K. B. 704; affirmed by the C. A. [1920] 3 K. B. 409, 416.

Giveen for the defendant. The claim is for Frs. 18,035, and that must remain in French currency until the date when judgment is given in the action; it is then convertible into sterling, because the English Courts have no power to order payment except in English currency. The decision in *Di Ferdinando* v. *Simon Smits & Co.* (1) does not apply to the case of a debt, but only to damages. Scrutton L.J. in his judgment in the Court of Appeal in that case said: "I have been unable to find that interest by way of damages, has ever been allowed to cover alteration in the exchange, and counsel have also been unable to find any such case. I think the reason is the one I have already given—namely, that those damages are too remote. The variation in the exchange is not sufficiently connected with the breach as to be within the contemplation of the parties." *Di Ferdinando* v. *Simon Smits & Co.* (1) was a case of non-delivery of goods, and the action there was for damages for conversion. But in the case of a debt, the right to recover does not crystallise until judgment. The issue of the writ cannot affect the nature of the claim, which remains in francs. Further, the ordinary rule here has no application, because there has been accord and satisfaction by payment of Frs. 18,035 pendente lite. The plaintiffs have never repudiated the receipt of this money by their manager, although it was paid to them over a year ago, and it is now too late to do so.

Compston K.C. in reply.

AVORY J. [His Lordship stated the facts as above and continued:] It is admitted that if the debt had been paid on December 31, 1914, its equivalent in English money would have been 715*l.* The writ was not issued until November 9, 1919, but there is no ground for saying that the delay prejudiced the plaintiffs' rights in any way. The claim as indorsed on the writ is for Frs. 18,035, "the English equivalent of which on December 31, 1914, is 715*l.* 13*s.* 4*d.*" In my view, once it is admitted that the plaintiffs can sue in the English Courts for the debt, they are entitled to recover 715*l.*

(1) [1920] 2 K. B. 704; affirmed by the C. A. [1920] 3 K. B. 409, 416.

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sterling. It appears to me that *Manners* v. *Pearson & Sons* (1) and *Di Ferdinando* v. *Simon Smits & Co.* (2) are authorities in support of this proposition. In *Manners' Case* (1) Lindley M.R. quotes the following passage from Lord Eldon's judgment in *Cash* v. *Kennion* (3): "I cannot bring myself to doubt, that, where a man agrees to pay 100*l.* in London upon the 1st of January, he ought to have that sum there upon that day. If he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had, if the contract had been performed." That principle was adopted and applied by the Court of Appeal in *Manners' Case.* (1) It is true that, the action being brought for an account, the actual decision in that case was that the balance was not due to the plaintiff until the whole account had been taken; but the principle itself is clear, and Vaughan Williams L.J., although he delivered a dissenting judgment, did not as regards this principle differ from the rest of the Court. He says: (4) "It seems clear that, in an action in whatever form in the English Courts for the recovery of a debt payable in foreign currency, the amount of the English judgment or order must be expressed in English currency, and that, unless the relative values of the respective currencies are fixed by statute or some authority binding the English Courts or by the agreement of the litigants, the amount of the English judgment or order must be based on the quantity of English sterling which one would have to pay here to obtain in the market the amount of the debt payable in foreign currency delivered at the appointed place of payment—i.e., the amount payable according to the rate of exchange." He then referred to *Scott* v. *Bevan* (5), and said: "It seems plain that this mode of computing the value of foreign currency in English sterling, and thus converting the one currency into the other, is based upon damages for the breach of contract to deliver the commodity bargained for at the appointed time and place, and, if this

(1) [1898] 1 Ch. 581, 588.
(2) [1920] 3 K. B. 409.
(3) (1805) 11 Ves. 314, 316.
(4) [1898] 1 Ch. 581, 592.
(5) (1831) 2 B. & Ad. 78.

is so, it follows that the date at which that value must be ascertained is the date of the breach, and not the date of the judgment." In my opinion those expressions apply with equal force to a claim for debt and to a claim for damages, and therefore upon the issue of the writ the plaintiffs were entitled to recover 715*l.* subject to any defence to that claim. The defendant's further answer is that she has paid the debt since the action was brought and that the plaintiffs have accepted payment in satisfaction. [His Lordship then found as a fact that the payment was not accepted by the plaintiffs in satisfaction of the debt and continued :] Undoubtedly, the point raised by Mr. Giveen calls for consideration. The authorities appear to me to show that when judgment is given, the amount due on the judgment must be converted into English currency, but not at the rate of exchange prevailing at that date. In my view they show that the plaintiffs being entitled to sue in an English Court can claim payment in English currency at the rate of exchange prevailing when the debt fell due. The plaintiffs are therefore entitled to judgment for 715*l.*, out of which credit must be given for Frs. 18,035 calculated at the rate of exchange prevailing in May, 1920, when this payment was made by the defendant.

Judgment for plaintiffs.

Solicitors for the plaintiffs : *Hutchison & Cuff.*
Solicitors for the defendant : *Cohen & Cohen.*

F. P. F.

C. C. A.
1921
July 18.

[IN THE COURT OF CRIMINAL APPEAL.]

THE KING *v.* HENRY BEECHAM.

Criminal Law—Evidence by Defendant as to his good Character—Evidence forced from Defendant in Cross-examination—Question as to previous Conviction—Admissibility—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1 (*f*) (*ii*)—*Appeal—Dismissal—No substantial Miscarriage of Justice—Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 4, *sub-s.* 1, *proviso.*

The defendant was charged on indictment with manslaughter, it being alleged that by driving his motor-car at an excessive speed he ran down and killed a boy. The defendant in cross-examination was repeatedly asked and pressed to answer the question whether he did not buy the motor-car because it was capable of being driven at high speed, and he at last replied: "It did not appeal to me for that reason, because I do not care for driving at a high rate of speed myself." The prosecution, treating that statement as evidence given by the defendant of his good character as a driver, then asked him whether he had not been repeatedly convicted of driving to the public danger, and the defendant, being required by the judge to reply, admitted that that was so. The defendant was convicted. On appeal:—

Held, that the method of cross-examination by which the defendant had been led to make the above-quoted statement could not be approved, that by making the statement in the circumstances he could not be taken to have "given evidence of his good character" within the meaning of the Criminal Evidence Act, 1898, s. 1 (*f*) (ii), and, therefore, that he ought not to have been asked or required to answer the question as to his previous convictions and that his evidence regarding them was inadmissible.

Held, however, that under the Criminal Appeal Act, 1907, s. 4, sub-s. 1, proviso, notwithstanding that the above point might be decided in favour of the defendant, the appeal should be dismissed, inasmuch as, having regard to the other evidence given at the trial, no substantial miscarriage of justice had actually occurred.

APPEAL by defendant against conviction.

The defendant was charged on indictment with manslaughter, it being alleged by the prosecution that on January 2, 1921, near Baldock in Hertfordshire, when driving his motor-car at an excessive and unjustifiable speed, he ran down and killed a boy six years of age.

On June 23 and 24, 1921, the trial took place at Hertford Assizes before Rowlatt J. and a jury. The defendant pleaded not guilty.

On behalf of the prosecution evidence was given that on the occasion in question the defendant's motor-car was

travelling from Baldock towards Royston, that in Royston Road it mounted the greensward on the near side of the road, passed along it for about 120 feet crossing over two gullies, ran into some children, killing one of them and injuring two others, returned to the road traversing it 60 feet further, and coming to rest in the gutter on the opposite side; and it was stated by four witnesses that when the car mounted the bank it was travelling at an extraordinarily high speed.

On behalf of the defence evidence was given by the defendant himself, by three persons who were with him in the car and by another witness, H. Deans, that the car was travelling at a moderate pace of from 17 to 25 miles per hour; and by Deans and his wife that in the tracks of the car upon the road there were the marks of two skids. The defendant in his evidence stated that when he first saw the children the speed of the car was from 20 to 25 miles per hour, that he at once touched the brake, that the car which was on a camber in the road then had a back-wheel skid which took it to the right, that he then took off the brake and turned the wheels to the left, when the car got into the gutter, that he then turned the wheels to the right, when there was a front-wheel skid which carried the car on to the bank, and that in crossing the first gully the steering gear was shaken in his hand. He also stated that after the car had got on the bank he did not definitely know what happened, that he suggested that in putting his foot upon the brake pedal he accidentally put it also upon the accelerator which was close beside the brake pedal and projected slightly above it, thus unintentionally increasing the speed, and that he could not say definitely where the children were.

The cross-examination of the defendant by the leading counsel for the prosecution was in part as follows :—

"Q. This car of yours has been described as a 'freak car.' Why did you have this car? What is it for—a narrow car with a high power? Why do you have a car like that? What is it for?

"A. For driving.

. . . . . .

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"Q. High powered and narrow. Why did you buy that particular kind of car ?

"A. I had no particular reason for doing so.

"Q. Was it not because it was capable of very high speed ?

"A. I do not think so.

"Q. What other reason can you give for choosing a car of that build ?

"A. It is a car I had never bought before and never driven.

"Q. Why buy it except that it was capable of being driven at a very high speed ?

"A. I bought it because I wanted to buy it.

"Q. Because you wanted to buy a car that was capable of being driven at a very high speed. Is that why you bought it ?

"A. No : that was not entirely the purpose.

"Q. Was that one of the reasons why you bought it ?

"A. One of the reasons.

"Q. What is the other ?

"A. Because the car appealed to me.

"Q. For what reason except that it could be driven at a high rate of speed did this car appeal to you ?

"A. It did not appeal to me for that reason, because I do not care for driving at a high rate of speed myself.

"Q. Do you put that upon me—that you do not care for driving at a high rate of speed ? Is that what you say ?

"A. That is what I say.

"Q. Is it true ?

"A. It is true."

Counsel thereupon asked the defendant whether he had not been repeatedly convicted of driving to the public danger. The defendant asked the learned judge whether he was obliged to answer that question, and was told that he was, as, by saying that he did not care for driving at a high rate of speed, he had brought it on himself. The defendant then answered that it was true that he had been several times previously convicted.

In re-examination the defendant stated that these previous convictions had taken place before 1913.

The jury, having heard the evidence and speeches of counsel and the summing up of the learned judge, returned a verdict of guilty, and the defendant was convicted and sentenced to twelve calendar months' imprisonment in the second division.

The defendant appealed on the grounds that he was asked and required to answer a question in cross-examination as to his previous convictions as a motorist contrary to s. 1 (*f*) of the Criminal Evidence Act, 1898 (1); that his statement that he did not care for driving at a high rate of speed did not amount to giving evidence of good character; that it was not a voluntary statement or part of his defence, but was forced from him by a long series of questions in cross-examination; that his convictions for driving to the danger of the public, the most recent in 1913, were irrelevant to the issue in his case—namely, his speed on January 2, 1921—and that their introduction was in the circumstances oppressive and contrary to the intention of the Criminal Evidence Act, 1898; that the judge in his summing up failed to make any reference to the evidence of the three persons who were in defendant's car at the time of the accident and gave evidence as to his moderate speed; and that the judge misdirected the jury by suggesting that the witness Deans, called in defendant's defence, was really a witness of high speed, and by coupling his evidence with that of the witnesses for the prosecution.

Curtis Bennett K.C. (*Roland Oliver* with him) for the

(1) Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36): Sect. 1: "Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows:—

. . . . .

(*f*) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—(ii) he . . . . has given evidence of his good character. . . . ."

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defendant, appellant. The conviction was wrong and should not be upheld.

The evidence as to the defendant's previous convictions was wrongly admitted. The defendant ought not to have been asked or required to answer the question as to his previous convictions. The defendant had not "given evidence of his good character" within the meaning of the Criminal Evidence Act, 1898, s. 1 (*f*) (ii). The statement made by him in cross-examination that he did not care for driving at a high speed did not amount to evidence of good character within the meaning of that enactment. That statement was not made by the defendant voluntarily, but was forced from him in cross-examination. He was asked time after time whether he did not buy the car because it was capable of being driven at a high speed, and he was left no choice except either to admit that he bought the car for that reason, or to give the answer which he did give. An answer such as that obtained by these methods is not evidence of good character within the contemplation of the statute.

Further, the summing up of the learned judge was defective and involved a misdirection of the jury for the reasons stated in the defendant's notice of appeal.

Ronald Walker for the prosecution. The conviction was right. None of the points raised on the appeal should be decided in favour of the defendant.

There is no substance in the point that the defendant ought not to have been asked or required to answer the question as to his previous convictions. The defendant made the statement in cross-examination that he did not care for driving at a high rate of speed not under compulsion, but voluntarily, for the purpose of creating in the minds of the jury the impression that he was a careful driver. When he made that statement he had "given evidence of his good character" within the meaning of s. 1 (*f*) (ii) of the Act of 1898, and under that clause he could therefore be cross-examined as to his previous convictions: *Rex* v. *Hudson* (1), per Lord Alverstone C.J.

(1) [1912] 2 K. B. 464.

Even if the Court thinks that the points raised in the appeal should be decided in favour of the appellant, it does not follow that the conviction must be set aside. Apart altogether from the evidence of the defendant's previous convictions there was abundant evidence to justify the jury in finding the defendant guilty. The Court ought therefore to dismiss the appeal under the Criminal Appeal Act, 1907, s. 4, sub-s. 1, proviso, on the ground that no substantial miscarriage of justice actually occurred: *Rex* v. *Williams and Woodley* (1) and *Rex* v. *Cohen and Bateman.* (2)

Curtis Bennett K.C. in reply. If the Court is of opinion that the points raised in the appeal should be decided in favour of the appellant, it ought to allow the appeal. Apart from the evidence as to the defendant's previous convictions, the remaining admissible evidence was not so adverse to the defendant that the jury must necessarily have found the defendant guilty. That being so, if the evidence as to the previous convictions was improperly admitted, it cannot be said that the case is one in which the Court should dismiss the appeal on the ground that "no substantial miscarriage of justice has actually occurred" within the Act of 1907, s. 4, sub-s. 1, proviso: *Rex* v. *Rodley* (3); *Rex* v. *Kurasch* (4); *Rex* v. *Wilson* (5); *Rex* v. *Rouse* (6); *Rex* v. *Bridgwater* (7); *Rex* v. *Ellis* (8); *Rex* v. *Biggin.* (9)

[AVORY J. referred to *Rex* v. *Solomon.* (10)]

The judgment of the Court was delivered by

DARLING J., who, after stating the facts, continued: In this appeal one of the points raised by the defendant is that the summing up at the trial was faulty, inasmuch as it did not direct the attention of the jury to the evidence given by the witnesses who were in the motor-car with the defendant as to the speed at which he was driving, although it did direct

(1) (1920) 89 L. J. (K. B.) 557; 14 Cr. App. R. 135.
(2) (1909) 2 Cr. App. R. 197.
(3) [1913] 3 K. B. 468.
(4) [1915] 2 K. B. 749.
(5) (1915) 11 Cr. App. R. 251, 255.
(6) [1904] 1 K. B. 184.
(7) [1905] 1 K. B. 131.
(8) [1910] 2 K. B. 746.
(9) [1920] 1 K. B. 213.
(10) (1909) 2 Cr. App. R. 80.

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their attention to the evidence given by the witnesses for the prosecution and by another witness for the defence as to that matter. We have carefully read and considered the summing up, and our joint opinion is that it is certainly unfortunate that it omitted to make specific reference to the evidence of the witnesses who were with the defendant in the car, and that by reason of its having omitted to do so it is defective and unsatisfactory. We think, however, that this defect in the summing up did not affect the result of the trial, because we are satisfied that the evidence in question had been forcibly called to the attention of the jury by counsel for the defence, and that it cannot have been absent from their minds when they considered their verdict.

The defendant also raises the legal point that he was improperly cross-examined and made to admit his previous convictions for driving a motor-car to the danger of the public. The defendant is entitled to raise that point, because there is no doubt that as soon as the question whether he had been previously convicted was put to him in cross-examination he asked the learned judge whether he was obliged to answer it and the judge ruled that in view of his previous answers in cross-examination he was obliged to do so. The cross-examination of the defendant so far as material to this point was as follows: [His Lordship read the portion of the cross-examination set out above and continued:] The defendant by being asked repeatedly whether he did not buy the motor-car because it could be driven at a high speed was thus obliged either to admit that he bought it for that reason or to give some such answer as he did give—namely, that he did not care for driving at a high speed. Having regard to that cross-examination we feel bound to say that we cannot approve of the manner in which the defendant was led by counsel for the prosecution to give an answer which in our view virtually amounted to putting his character as a driver in issue. If the method by which this defendant was induced to bring his character into question were to be held legitimate, the result would be that practically any defendant might be forced into the same position. We are not

satisfied that the defendant by his answer to these questions had "given evidence of his good character" within the meaning of the Criminal Evidence Act, 1898, s. 1 (*f*) (ii). Counsel for the prosecution, however, treated that answer of the defendant as evidence given by him of his good character within the meaning of that provision and proceeded to ask him whether he had not been repeatedly convicted of driving to the public danger. The defendant took the objection that he was being asked a question which the prosecution had no legal right to put to him and he asked the learned judge whether he was obliged to answer it. The judge ruled that the question could be put. We think that the question could not, in the circumstances, be put, and that the ruling of the judge was wrong. In our opinion therefore this point should be decided in favour of the defendant.

It does not, however, follow that the appeal must be allowed. We have to inquire further whether the case comes within the Criminal Appeal Act, 1907, s. 4, sub-s. 1, proviso, which enacts that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred. In order to arrive at a definite conclusion on this point it is necessary to consider some of the previous decisions of this Court in which the meaning of that proviso has been discussed. In *Rex* v. *Wilson* (1) Avory J., in delivering the judgment of the Court, said: "The next question is whether there was a substantial miscarriage of justice. This is not a case in which the Court can say that there has not been such a miscarriage, for that can only apply where the Court can also say that the jury certainly would have come to the same conclusion if the evidence objected to had not been given. It is impossible to say that here." In *Rex* v. *Williams and Woodley* (2) Lord Reading C.J. for the Court, after quoting with approval what was said by Channell J. in *Rex* v. *Cohen and Bateman* (3) to the same effect, continued: "It is

(1) 11 Cr. App. R. 251, 255. (2) 14 Cr. App. R. 135, 137.
(3) 2 Cr. App. R. 197, 208.

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sufficient to say that here is a case of a serious irregularity, and that applying the proviso of s. 4 of the Act of 1907, we have come to the conclusion on the facts of this case, and having regard to the evidence given at the trial, that without this irregularity, and assuming that there were no notes of the previous convictions of the appellants on the abstract supplied to the jury, they must inevitably have arrived at the same verdict of guilty against the appellants." In our opinion the expression of the true principle on which the proviso is to be applied is to be found in these two cases.

As to the present case, we are of opinion that no substantial miscarriage of justice has occurred. We have unanimously come to the conclusion that, even if the summing up had been perfect, and the defendant in cross-examination had not been asked or required to answer the question as to his previous convictions, still the jury must have found the defendant guilty of manslaughter. We are satisfied that they must have come to that conclusion on all the indisputably legal evidence, having regard especially to the statements made by the defendant in his examination in chief to the effect that when the motor-car was on the bank he did not definitely know what happened, that the reason why he could not stop the car might have been that he unintentionally put his foot on the accelerator, and that he could not say definitely where the children were.

We must therefore dismiss the appeal.

As to the sentence, it will run from the date of conviction.

Appeal dismissed.

Solicitors for defendant, appellant: *Russell-Cooke & Co.*

Solicitor for prosecution: *Director of Public Prosecutions.*

J. R.

ARMOUR AND COMPANY, LIMITED *v.* LEOPOLD WALFORD (LONDON), LIMITED.

1921
July 27, 28.

[1921. A. 849.]

Shipping—Carriage by Sea—Booking Slip—Bill of Lading—"On Deck" Clause—Reasonableness—Condition, whether binding—Rights of Parties as to Notice.

A bill of lading is not conclusive of the true contract between shipper and shipowner; but if a shipper chooses to accept from the shipowner a bill of lading in a certain form without protest he is ordinarily bound by it. A booking slip relating to shipment by the defendants of a quantity of candles belonging to the plaintiffs from London to Antwerp contained the words: "All engagements are made subject to the conditions terms and/or exceptions of our Bills of Lading. . . . . No insurances of any description are booked without special instructions. No cargo shipped unless Walford Bills of Lading are used: no other bills of lading are accepted."

This booking slip was approved by the plaintiffs, and the defendants then sent their usual bill of lading, which contained the words (clause 11): "The company has the right to carry the goods below deck and/or on deck . . . . and shall not be liable for any loss damage or injury within the exceptions in this bill of lading whether due to negligence or not." The goods were placed on deck by the defendants, and although carefully protected and arranged they were injured on the voyage by sea-water through the ordinary perils of the sea:—

Held (1.) that the plaintiffs had accepted the booking slip and bill of lading as being in proper form and were bound by them; (2.) that the effect of clause 11 of the bill of lading was not limited to goods which by usual practice would be placed on deck, but extended to the goods in question, which were actually named in the bill of lading; (3.) that the defendants owed no duty to the plaintiffs under the contract to inform them that the goods were about to be or had been placed on deck and not below deck.

Action tried by McCardie J.

The following statement of facts is taken from the judgment: The plaintiffs, as owners of goods shipped on board a steamer of the defendants, claim damages for breach of contract. The defendants run a line of steamships to continental ports. In March, 1919, the plaintiffs wished to send 25 tons of candles from London to Antwerp. They communicated with the defendants. As a result, the defendants sent to the plaintiffs a booking slip dated March 5, 1919. So far

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as material it said: "We beg to confirm freight engagement as follows" (then followed a statement of cargo, rate, port of shipment and port of destination). The slip proceeded as follows: "All engagements are made subject to the conditions, terms and/or exceptions of our Bills of Lading and also to the conditions and/or regulations of any steamboat, Railway, or Canal Company by whom the goods may be conveyed and all goods are at the risk of senders or owners thereof until actually shipped on board the Steamer. No Insurances of any description are booked without special instructions. No cargo shipped unless Walford Lines Bills of Lading are used; no other bills of lading accepted."

The plaintiffs approved the booking slip. The statement of claim expressly alleges that this slip was part of the bargain between the parties.

A portion of the 25 tons was shipped on the defendants' steamship *Poldiep* on or about March 18, 1919, and a bill of lading dated March 19 was given to the plaintiffs. It is as to these goods that the claim arises.

The bill contains many clauses. Clause 11 is the only one material to be set out. It is as follows:

Clause 11: "The Company has the right to carry the goods below deck and/or on deck, and in branch steamers, coasting or river steamers or vessels and/or lighters launches or boats and to land or store goods for the purposes of transhipment, reshipment or further carriage and shall have the right to sub-contract in respect of any such carriage or part thereof and shall not be liable for any loss, damage or injury within the exceptions in this bill of lading whether due to negligence or not but such exceptions shall apply to carriage by such sub-contractors as if such sub-contractors were specifically mentioned in the said exceptions."

I may mention that clause 1 of the bill of lading refers to many classes of goods ranging from gold dust to statuary, bank-notes to laces and furs, and that clause 2 contains a widely-worded negligence and perils of the sea clause in favour of the ship-owners.

The goods were placed on the deck of the *Poldiep*. It

is not suggested that there was any carelessness in the way they were arranged or protected. Whilst on the voyage to Antwerp they were injured by sea-water, through the ordinary "perils of the sea." The damage is agreed at 1235*l.*

Raeburn K.C. and *Claughton Scott* for the plaintiffs.

R. A. Wright K.C. and *D. N. Pritt* (*H. M. Paul* with them) for the defendants.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

July 28. McCARDIE J. in a considered judgment stated the facts as above and continued: Such are the broad facts. I take in order the contentions of the plaintiffs and I will briefly state as to each contention such further facts as are relevant. In the first place the plaintiffs assert that they are not bound by clause 11 of the bill of lading; that defendants therefore wrongfully placed the candles *on* deck and not below deck, and that defendants are consequently hit by the rule stated in art. 48 of Scrutton and Mackinnon on Charterparties, 10th ed., that the effect of unauthorized deck storage is to set aside the exception of the bill of lading and to render the shipowner liable under his contract of carriage for damage happening to the goods so stored.

The plaintiffs assert that clause 11 was unusual, that it was not specifically drawn to their attention, that they were not aware of it and therefore are not bound by its provisions. I cannot accept this contention of the plaintiffs. I think they were clearly bound by clause 11. They had accepted the booking slip which provided that the goods were to be shipped under the defendants' special form of bill of lading and none other. The bill of lading is made out in accordance with the booking slip. The form used has been unvaryingly employed by the defendants for seven or eight years and clause 11 has for that period appeared as it is now. The defendants have but one form of bill of lading. In 1916

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and 1917 the plaintiffs made several shipments with the defendants under similar bills of lading with a like clause.

Moreover in the present case the plaintiffs' traffic manager got from his stationers several printed forms of the defendants' bill of lading and sent those forms to the defendants, who signed them and then forwarded them to the plaintiffs. They are the bills of lading for the goods now in question. I hold that the plaintiffs in fact accepted them, as they were bound to accept them, as bills of lading in proper form. Mr. Wright for the defendants called my attention to Carver on Carriage by Sea, 6th ed., s. 122, where the learned author considers whether a bill of lading is to be taken as a conclusive statement of the contract of carriage. Several useful cases are there cited. In my view a bill of lading is not, as between shipper and shipowner, conclusive of the true contract. It may, e.g., be inconsistent with a prior overriding, and express written bargain as to the terms on which goods shall be carried or the form in which bills of lading shall be issued. The law is stated somewhat favourably to the shipper in the article by the late Lord Justice Kennedy in Halsbury's Laws of England, vol. 26, p. 148, where he says: "In some cases the bill of lading is to be regarded as evidence only of a pre-existing contract" (see per Lord Bramwell in *Sewell* v. *Burdick* (1) and *Wagstaff* v. *Anderson* (2), "and the person accepting it is not necessarily bound by all its stipulations" (*Crooks* v. *Allan* (3) and *Lewis* v. *M'Kee* (4)), "but may be entitled to repudiate them on the ground that as he did not know, and could not reasonably be expected to know, of their existence, his assent to them is not to be inferred from his acceptance of the bill of lading without objection": *Crooks* v. *Allan.* (3) I respectfully doubt if this passage adequately distinguishes between the mere physical receipt of the bill of lading and the mental acceptance of it, whether it has or has not been fully read by the shipper. It must be remembered that the Statute of Frauds does

(1) (1884) 10 App. Cas. 74, 105. reported 49 L. J. (Q. B.) 485, 488, 489
(2) (1880) 5 C. P. D. 171, as (3) (1879) 5 Q. B. D. 38.
(4) (1868) L. R. 4 Ex. 58.

not ordinarily apply to a contract for carriage by sea. The bargain may be collected from various documents or other sources: see Carver on Carriage by Sea, 6th ed., s. 53, and Scrutton on Charterparties, art. 3.

Whatever the prior express bargain has been, a shipper is free to accept any bills of lading he chooses. If therefore he has chosen to receive without protest a bill of lading in a certain form he should ordinarily be bound by it, for as Mr. Carver well observes in s. 56 of his book: "Where that has been done it is difficult to suppose that the document can be treated as not being what it seems to be." That learned author proceeds: "The practice of looking to it as the contract may be said to be uniform and indeed has been adopted by the Legislature (Bills of Lading Act, 1855); and the scarcity of authority is in truth a strong confirmation of the view that it is the contract: for it shows that in practice the point has not been considered open to question."

Here the plaintiffs, I am satisfied, actually accepted the bill of lading in question as the bargain for carriage.

From whatever point of view the case is regarded, be it on the principle of *Richardson* v. *Rowntree* (1) or on the point that the bill accorded with the provisions of the booking slip or the ground that the plaintiffs actually accepted the bill of lading, they are bound by clause 11.

The print of clause 11 is small, and in this connection *Crooks* v. *Allan* (2), *Roe* v. *Naylor* (3), and *Gibaud* v. *Great Eastern Ry. Co.* (4) were cited before me. Clause 11, however, is in clear print. It is as plain as the other clauses, and it takes its due place in the sequence of clauses. It is perfectly legible. The cases just cited do not therefore require consideration.

Mr. Raeburn next contended that, assuming the plaintiffs to be bound by clause 11, yet this clause only applied to the classes of goods which in the ordinary course of

(1) [1894] A. C. 217.
(2) 5 Q. B. D. 38.
(3) [1917] 1 K. B. 712.
(4) [1920] 3 K. B. 689; affirmed by C. A. [1921] 2 K. B. 426.

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shipping and according to the ordinary practice of shipowners were usually placed *on* deck and not *below* deck. In my opinion this contention also fails. Clause 11 would scarcely be needed if its application were limited to goods which by usual practice would be placed on deck. Its central object, I think, is to give the shipowners a right to stow on deck those goods which ordinarily would be placed below deck. The clause is very broadly worded. It contains no hint of limitation as to the class of goods to which it applies. Prima facie it applies to all goods. I see no ground for cutting down its prima facie effect. It is part of a body of clauses which includes clause 1. Clause 1, as I have already pointed out, refers to goods of many sorts. In actual practice, moreover, the defendants have carried on deck articles of all kinds—from wheat to lace. This is not unusual with shipowners when carrying on short sea routes. The words of the clause are: "The Company has the right to carry the goods below deck and/or on deck." It seems plain to me that those words refer and must refer to the goods actually named in the bill of lading. Here those goods were the candles in question, and in my view the defendants had the contractual right to stow them on deck. I respectfully agree with the statement in Scrutton and Mackinnon on Charterparties, 10th ed., pp. 283–4, Notes to art. 99, that clauses in a bill of lading must be construed in the light of the commercial adventure undertaken by the shipowner. The decisions upon clauses giving leave "to call at any ports" or "to call at any ports in any order" indicate the restriction which may be placed on language of apparent breadth. But in the present case the words are broad and clear, and I see no method of cutting down their operation, save in such a way as to defeat the very object of the clause itself.

The final point for decision arises on the able argument of Mr. Raeburn that the defendants here owed a contractual duty to the plaintiffs to inform them that the goods were about to be or had been placed on deck and not below deck, so as thereby to enable the plaintiffs to effect an appropriate and valid insurance if they so wished.

It is admitted that the plaintiffs were not in fact aware until the goods had actually reached Antwerp on March 26, 1919, that they had been stowed on deck. The importance of the contention of the plaintiffs lies in the fact that they had actually wished and intended that the goods should be stowed below deck and not on deck. They had taken out ordinary insurance policies which did not provide for cargo carried on deck. Hence the plaintiffs are hit by r. 17 of the Rules for Construction of Policy under the Marine Insurance Act, 1906, and cannot recover against their underwriters. They submit that I ought to read an implied condition into the contract that the defendants were under the circumstances bound to notify them of the stowage on deck. It was admitted by one of the defendants' managers in evidence that the defendants as a matter of courtesy often notify cargo owners of an *on deck* shipment so as to enable due insurance to be made. It was also stated by a witness for the plaintiffs (the shipping manager of a continental line of steamers who use the "on deck" clause) that if they found they had to put a consignment on deck they would thereupon inform the consignor of the fact. The point before me, however, is not a question of courtesy but of legal obligation. The ever-recurring case of *The Moorcock* (1) has offered itself for consideration. There Bowen L.J. said: "The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side." But the equally recurring case of *Hamlyn* v. *Wood* (2) has also been cited. There Lord Esher said: "I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to

(1) (1889) 14 P. D. 64, 68. (2) [1891] 2 Q. B. 488, 491.

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make such an implication. It must be a necessary implication in the sense that I have mentioned."

From the above two fertile decisions a vast crop of later cases has been begotten. The principle however remains unchanged in spite of the aggregation of case law on the matter. Now in this litigation before me I cannot create the implied obligation suggested by the plaintiffs. Notice to the plaintiffs by the defendants of "on deck" stowage was not essential to the efficacy of the contract of carriage by sea. The bill of lading was a complete and effective and workable document without any implication of a duty to give notice. Insurance was a collateral thing. It was a matter for the plaintiffs alone. It did not touch the defendants. By the terms of the booking slip the defendants clearly though impliedly disclaimed responsibility for insurance. The plaintiffs knew the terms of the contract of carriage. They were aware of clause 11. There was nothing to prevent them from taking out a policy to cover the contingencies which might arise under that clause 11. The extent of such a policy was a matter for them and not for the defendants. The "on deck" clause is well known. It has existed on numerous lines for many years. Why should the defendants assume that the plaintiffs had not got an adequate assurance? The matter lay within the plaintiffs' concern alone. It seems to me also that the plaintiffs had as much opportunity of knowledge as the defendants. In an earlier shipment of part of the total lot of candles the plaintiffs' superintendent had watched its stowage on board the steamship *Abeille*. There was nothing to prevent an agent for them from ascertaining whether the candles in question were placed below deck or on deck of the *Poldiep*. If I were to hold that the obligation to give notice existed on the facts before me it would follow, as Mr. Wright pointed out, that an equal obligation would be cast on the defendant with respect to transhipment or reshipment and the other matters referred to in clause 11. Mr. Raeburn for the plaintiffs cited the case of *Hood* v. *West End Motor Car Packing Co.* (1), where

(1) [1917] 2 K. B. 38.

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the Court of Appeal held that an implied term existed, as between assured and underwriters, that notice should be given to the underwriters within a reasonable time after the assured knew that a motor-car, the subject of an insurance policy, was being carried on deck. That case turned, however, upon the particular requirements of insurance law, as between assured and underwriter, with respect to the Marine Insurance Act, 1906, and the Institute Cargo Clause. It is, in my view, plainly distinguishable from the facts now before me. I cannot here imply a condition requiring the defendants to notify the plaintiffs of the stowage on deck. I am indebted to Mr. Raeburn for his able arguments, but in my opinion the action fails and must be dismissed with costs.

Judgment accordingly.

Solicitor for plaintiffs : *F. L. Long.*
Solicitors for defendants : *Lawrence Jones & Co.*

F. P. F.

BAKER *v.* DALGLEISH STEAM SHIPPING COMPANY, LIMITED.

1921
June 23 ; *July* 22.

[1920. B. 4035.]

Negligence — Damages — Loss of Life — Pension to Widow and Children of deceased Seaman — Whether Pension to be taken into Account in assessing Damages — Fatal Accidents Act, 1846 (9 & 10 *Vict. c.* 93), *s.* 2.

In assessing the damages in an action under the Fatal Accidents Act, 1846, the fact that the plaintiff is in receipt of a pension dependent on the bounty of the Crown cannot be taken into account.

ACTION tried by Greer J.

The following statement of facts is taken from the judgment : "The plaintiff, Lily Baker, the widow of Philip William Baker, deceased, claims damages under the Fatal Accidents Act, 1846, on her own behalf and on behalf of her four infant children, by reason of the death of her said husband who was drowned as the result of a collision between

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the defendants' steamship *Kenilworth* and H.M.S. *Bittern*, in which her said husband was serving as chief petty officer. The defendants admitted that the collision and the consequent death of the plaintiff's husband were caused by the negligence of their servants, but denied that either the plaintiff or her said children had suffered any such damage as is necessary in law to entitle them to compensation under the Fatal Accidents Act.

"At the time of his death the plaintiff's husband was receiving a salary as such chief petty officer of 113*l.* per annum, but the plaintiff alleged that he received extra payments which brought his income up to 130*l.* He also received his uniform and keep while at sea, and the bulk of his income was devoted to the maintenance of his wife and family. After his death she received separation allowance at the rate of 25*s.* 6*d.* per week for six months, and thereafter was awarded a pension for herself and children under the regulations contained in Statutory Rules and Orders, No. 62 of 1919, and No. 1021 of 1920, made under s. 3 of the Naval and Marine Pay and Pensions Act, 1865. At first for forty-seven weeks she received a pension of 1*l.* 17*s.* 6*d.* a week, which was afterwards increased to 2*l.* 3*s.* 10*d.*, the amount she was receiving for herself and children under the said regulations at the time the action was brought and when it came on for hearing."

Sir Gordon Hewart A.-G. and *Ricketts* for the plaintiff. The fact that the plaintiff is in receipt of a pension does not affect her right to recover in this action. In *Admiralty Commissioners* v. *S.S. Amerika* (1) it was decided that pensions to the relatives of a deceased seaman are voluntary payments in the nature of compassionate allowances. The position is exactly the same under the War Pensions Act, 1920—see s. 8, sub-s. 1—and the regulations contained in Statutory Rules and Orders, No. 62 of 1919, and No. 1021 of 1920, made under the Naval and Marine Pay and Pensions Act, 1865, s. 3. By art. 10 of the 1920 Order it is expressly stated

(1) [1917] A. C. 38.

that pensions to the widows and children of deceased seamen or marines "shall not be claimed as of right"; art. 16 provides that any pension granted to a widow of a seaman or marine shall cease on her remarriage; and art. 24B provides that where a seaman or marine is injured or killed and a pension, allowance or grant is payable to or in respect of him, and where he or his widow or dependants receives compensation from the person alleged to be responsible for the act or omission which caused the injury or death, such compensation may be taken into consideration in assessing the pension, allowance or grant. The pension granted to the plaintiff is thus not to enure for the benefit of the negligent person, but the amount of compensation recovered is to go in relief of the pension.

Stuart Bevan K.C. and *Balloch* for the defendants. Regard must be had to the pension received by the plaintiff, who by its receipt is in a better position pecuniarily than she and her children were in during the lifetime of the deceased. The principle upon which damages in actions under Lord Campbell's Act are to be assessed was stated by Bramwell B. in *Bradburn* v. *Great Western Ry. Co.* (1) in these words: "The damages were to be a compensation to the family of the deceased equivalent to the pecuniary benefits which they might have reasonably expected from the continuance of his life. If, therefore, the person claiming damages was put by the death of his relative into possession of a large estate, there was no loss; he was a gainer by the event; and similarly, whatever comes into the possession of the family who have suffered by the death of their relative by reason of his death must be taken into account." That is the general principle, the only exception to its application being created by the Fatal Accidents (Damages) Act, 1908, which provides that in such actions as this nothing paid under a policy of insurance is to be taken into account. In this case the plaintiff wishes to import an additional exception in the case of a pension, but for that there is no warrant. Reliance is placed by the plaintiff upon the fact that the

(1) (1874) L. R. 10 Ex. 1, 3.

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pension is a voluntary payment by the Crown; but so, too, is the pay of a soldier or sailor: *Leaman* v. *The King*. (1) It is said that the pension might be withdrawn. Theoretically it might, but the probability of this being done is negligible. There is no instance of its having been done.

Ricketts in reply. The defendants who were wrongdoers cannot claim to benefit by the fact that the Crown makes a voluntary payment to the plaintiff.

Cur. adv. vult.

July 22. The following judgment was read.

GREER J. stated the facts set out above and continued: It was contended, as the fact was, that if the said pensions are to be taken into account, the plaintiff and her family are as well off pecuniarily as they would have been if the life of the said Philip William Baker had continued, and therefore they are not entitled to any compensation under the Fatal Accidents Act. It was contended on the other hand that under regulations 11 and 12 of the 1919 Regulations, and 24A and 24B of the 1920 Regulations the pension was entirely due to the voluntary bounty of the Crown, that it might be withdrawn or reduced at any time for any reasons that the Pensions Authority deemed sufficient, and that if and when she received compensation the amount could and would be taken into account in reduction of the pension under r. 24B of the Regulations of 1920.

The question for decision is whether the pension granted under those rules is to be taken into consideration in deciding whether the plaintiff and her daughters, or any of them, have suffered, by reason of the death of the plaintiff's husband, such material loss as the law requires to justify a judgment in their favour on a claim under the Fatal Accidents Act. On the other hand, it may be said that the question involved is not what is the legal position of the plaintiff and her daughters after the death as compared with their legal position before the death, but whether in fact they are any worse

(1) [1920] 3 K. B. 663.

off by reason of the death than they would have been if the plaintiff's husband had not been killed. It was pointed out by counsel for the defendants that during his life the husband's right to salary was not a legal right but just as much dependent upon the bounty of the Crown as was the pension after his death. On the other hand it was contended that though it was right to consider the benefits which the deceased's wife and family in fact enjoyed before his death, nothing can be taken into account in reduction of her claim for damages which depends on the bounty of the Crown, however certain it may be that that bounty would be continued during the plaintiff's life or during the minority of the other dependants. Sect. 2 of the Fatal Accidents Act, 1846, provides that "the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought." It is well settled that the damages are confined to compensation for the loss of material benefits or of the reasonable prospect of such benefits occasioned by the death. If by reason of the death the persons for whom the action is brought are as well or better off than they were before, there is no cause of action. It was accordingly decided that where the persons for whom the action was brought had the benefit of sums of money from a policy of insurance against death by accident this must be taken into consideration in reduction of damages: see *Hicks* v. *Newport Ry. Co.* (1) and *Bradburn* v. *Great Western Ry. Co.* (2) This anomalous result has been corrected by a recent statute so far as policies of insurance against death by accident are concerned: see 8 Edw. 7, c. 7. It is to be observed, however, that in the case of such policies the very circumstances which caused the loss on which the claim is based also cause the policy moneys to be recoverable. The question in such case is whether on the balance there has been loss to the plaintiff by reason of the death. In many cases workmen subscribe substantial sums for the relief of widows and families of their fellow-workmen killed

(1) (1857) 4 B. & S. 403n. (2) L. R. 10 Ex. 1.

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Greer J.

by accident. Could it possibly be contended that those voluntary gifts should be taken into account in estimating the loss sustained? I think not. I think the wife and children of the deceased workman would have suffered loss by reason of the death even though the generosity of friends may have procured for them a sum which equalizes the benefits they would have received if the deceased had not died. The death is not the cause in any proper sense of the voluntary contribution of friends, and it would be a gross injustice if the benefit of such contributions were to be assessed in relief of the wrongdoer. I think the same principles apply to a voluntary pension dependent upon the bounty of the Crown, and for these reasons I think the plaintiff is entitled to succeed.

I assess the damages at 1000*l.* and direct that the amount shall be divided as follows: 500*l.* to the widow, 100*l.* to Wilmot May Baker, 120*l.* to Frances Eleanor Baker, and 140*l.* each to Phyllis Lilian Baker and Winifred Violet Baker. The judgment will, of course, be with costs. The children's shares will be paid to the Public Trustee under Order XXII., r. 15.

Judgment for plaintiff.

Solicitor for plaintiff: *Treasury Solicitor.*
Solicitors for defendants: *Parker, Garrett & Co.*

J. S. H.

THE KING *v.* WANDSWORTH LICENSING JUSTICES. *Ex parte* WHITBREAD AND COMPANY, LIMITED.

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April 19, 20.

*Licensing Law—On-licence—Ante-*1869 *Beerhouse—Alteration—Consent of Justices—Conditions imposed by Justices—Surrender of another Licence—Payment of monopoly Value—Validity of Conditions—Licensing (Consolidation) Act,* 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 71.

Where under s. 71 of the Licensing (Consolidation) Act, 1910, the owners of licensed premises in respect of which a justices' on-licence was in force made an application to the licensing justices for their consent to an alteration in the premises which would give increased facilities for drinking :—

Held, (1.) that the justices were not entitled to take into consideration the fact that if they gave their consent to the alteration no monopoly value would be payable in respect of the increased drinking facilities thereby given; (2.) (by Lawrence C.J. and Darling J.; Avory J. reserving judgment on this point) that the justices were not entitled to make it a condition of giving their consent to the alteration that the applicants should surrender the licence of some other house of theirs anywhere in the district; but *quaere* (by Lawrence C.J. and Avory J.) whether the justices might not invite the surrender of the licence of another small house of the applicants' in the immediate neighbourhood of the premises in question.

Order Nisi for a mandamus.

The following statement of the facts of the case is taken substantially from an affidavit made on behalf of Messrs. Whitbread & Co., Ld., the applicants for the order nisi by Mr. G. D. Muggeridge of the firm of Martineau & Reid, their solicitors :—

The applicants were the owners of an ante-1869 beerhouse known as the "Rose and Crown," No. 158, Tooting Bec Road, on the south side of the road, in the Wandsworth Division of the County of London. The licence of the beerhouse had been held by the same family for eighty years, and a large and increasing business was carried on there. The internal arrangements of the beerhouse were old-fashioned, with the result that it was crowded during the hours when it was open. The district was full of small dwelling houses and there was no other on-licence within upwards of a quarter of a mile of the beerhouse.

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At and before the date next mentioned, and in accordance with their powers under the Metropolis Management Acts, 1855–1893, the London County Council in conjunction with the Wandsworth Borough Council were acquiring land in Tooting Bec Road for the purpose of setting back the frontages of the houses and widening the road, and the only building left to be set back was the said beerhouse.

On September 14, 1920, an agreement was entered into between the applicants and the London County Council by which, subject as therein provided, the applicants agreed to sell to the Council a plot of land being part of the then site of the said beerhouse for 3000*l.*; and, further, to demolish all parts of the building on the said plot, and to give vacant possession within two months from completion of the purchase; and, before commencing to rebuild the premises, as it would be necessary for them to do, to give seven days' notice thereof to the Council, The agreement was conditional upon the justices for the Wandsworth licensing division approving the plans prepared by the applicants' surveyor for the reconstruction of the house at an estimated cost of 8000*l.*, and if that approval was not obtained the agreement was to be void. The Council agreed to pay to the applicants certain of the legal costs and expenses.

On December 3, 1920, in accordance with the provisions of the agreement, an application was made by counsel on behalf of the tenant and licensee of the premises, and of the applicants as owners, to the Wandsworth licensing justices under s. 71 of the Licensing (Consolidation) Act, 1910 (1), for leave to rebuild the said beerhouse in accordance with the

(1) Sect. 71: "An alteration in any licensed premises in respect of which a justices' on-licence is in force, which gives increased facilities for drinking, or conceals from observation any part of the premises used for drinking, or which affects the communication between the part of the premises where intoxicating liquor is sold and any other part of the premises, or any street or other public way, shall not be made without the consent of the licensing justices given either at the general annual licensing meeting or at transfer sessions. (2.) The licensing justices may, before giving their consent, require plans of the proposed alterations to be deposited with their clerk at such time as they may determine. . . ."

plans which had been deposited. After the above facts had been stated to the bench, and the plans dealt with, the chairman said that the decision of the bench would be given at the general annual licensing meeting to be held on February 4, 1921, and that meanwhile some members of the bench would view the premises.

On January 17, 1921, the chairman of the bench with four or five other justices who had heard the application, viewed the premises, there being also present a representative from the solicitors' department of the London County Council, the surveyor for the applicants, and the said Mr. Muggeridge. The justices had the plans before them and asked questions as to the exact position of the new house with regard to the old, the estimated total cost, the contribution by the Council, and the trade of the house, and other general questions of that nature, to all which questions replies were given on behalf of the applicants. The chairman then asked how many licensed houses the applicants had in the Wandsworth division. It was explained on behalf of the applicants that that question could not be answered without inquiry, but that it was not a division in which the applicants had very many houses, and an offer was made to obtain the information, but the chairman replied that he did not think it mattered. The number was afterwards ascertained to be about fifteen or sixteen on-licences.

The affidavit continued as follows :—

"11. The justices then deliberated by themselves in a private room, and subsequently the chairman came out and stated to me [the deponent] that they had taken all the circumstances into consideration and the benefit there would be by the improved accommodation in the new house, and that the application would not be granted unless with the surrender of an on-licence in the Wandsworth division however small. I [the deponent] asked whether it would be of any use to consider an offer to surrender an off-licence, and the chairman said to me that it would be of no use to consider the surrender of an off-licence, as that would not be entertained.

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"12. At the general annual licensing meeting held on February 4, 1921, the application for the rebuilding of the "Rose and Crown" being mentioned by counsel appearing on behalf of Messrs. Whitbread & Co., the chairman said: 'Of course everything that was to be said was said on the last occasion. I do not know whether you have any proposal to submit. We have all the facts. We are prepared to hear any proposal you may have to make. If you have any proposal to make it will be considered.' Counsel then said: 'Am I right in saying that what you intimated to Mr. Muggeridge was that the bench had taken all the circumstances into consideration, but the application would not be granted unless with the surrender of an on-licence in the Wandsworth Division?' to which the chairman replied: 'All that we want to know is whether you have any proposal to make on those lines. At the present moment we are not prepared to consent. If you are prepared to submit a new proposal we are prepared to consider it when submitted. If we have the proposal for the surrender of an on-licence we shall be prepared to consider it.' Counsel then said that Messrs. Whitbread & Co. had very carefully considered the matter, and having regard to the fact that they were being put to a very large expense in rebuilding this house, and that the application was made at the instance of the London County Council, that they were not prepared to offer the surrender of an on-licence in the Wandsworth Division. The chairman then at once said without consulting any of the other justices sitting with him on the bench, 'The application is refused.'

"13. Counsel then submitted to the bench that in the consideration of an application under s. 71 of the Act the licensing justices are not entitled and have no power in law to take into consideration what, if any, licence the owners might be prepared to surrender, and referred to the decision of the Court of Appeal in *Rex* v. *Shann*. (1) Whilst the facts in that case were being stated the chairman intervened saying 'We have made no proposal. We have asked you

(1) [1910] K. B. 418.

to make a proposal. We are prepared to consider this matter upon an offer being made.' Counsel then proceeded to deal further with *Rex* v. *Shann* (1), but the chairman interrupted by saying 'If you want to submit an argument to this Court, it is a question for a superior Court. We have given our decision. The argument has been continued after we have given our decision.'

"14. No objection was raised by any member of the bench to the plans of the proposed new building. . . . .

"15. On February 24, 1921, I wrote a letter asking Mr. Baines [the clerk to the justices] for a copy of the order or minute of the justices made on February 4 on the refusal of the application . . . . and on the following day received a reply that the only minute is 'Application refused.'"

On March 18, 1921, the applicants obtained an order nisi calling upon the justices to show cause why a writ of mandamus should not issue commanding them to hear and determine an application by the applicants under s. 71 of the Act of 1910, for the consent of the justices to the alterations in the said beerhouse on the grounds that the justices were not entitled and had no power to take into consideration what if any licence the owners might be prepared to surrender. (2)

On April 8, 1921, an affidavit was made by the chairman of the licensing justices in which he stated (inter alia) (para. 2) that subject as therein appeared he admitted the facts above stated. The affidavit continued as follows:—

"4. The said justices duly deliberated upon the application for the reconstruction of the said premises made by Mrs. E. S. Booker the licensee of the said premises, and the said justices took into consideration the fact that if the said premises were reconstructed in accordance with the plans submitted to the said justices the licensed area of the said premises would be considerably increased and greater facilities for the sale of intoxicating liquors would be provided which would be equivalent to the grant of a new licence whilst no

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(2) A rule nisi for a certiorari was also obtained, but it was not proceeded with, as no order had been drawn up by the justices.

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monopoly value would be payable in respect thereof. The said justices also took into consideration the fact that there is a considerable area of land in the vicinity of the said premises which may ultimately be built upon, and if at any future time it became necessary to grant an additional licence in the neighbourhood of the said premises the monopoly value then obtainable would be reduced if the said premises were reconstructed in accordance with the plans submitted to the justices."

The affidavit further stated (para. 5) that the justices were in possession of all the facts before they arrived at their decision and that the deponent submitted that they had heard and determined the application.

Sir Ernest Wild K.C. and *J. B. Melville* showed cause. The order nisi for a mandamus should be discharged.

The application to the justices was an application under s. 71 of the Licensing (Consolidation) Act, 1910, for their consent to an alteration in these licensed premises in respect of which an old on-licence is in force, which alteration will give increased facilities for drinking. That section gives the justices an absolute discretion either to grant or to refuse the application, and where they honestly exercise their discretion for the purpose of carrying out the objects of the Act, their decision cannot be questioned : *Leeds Corporation* v. *Ryder*. (1)

On an application under s. 71 the justices are entitled to make it a condition of the granting of the application that the applicant should surrender the licence of some other premises of his in the district as an equivalent for the increased facilities for drinking which the alteration will give. It is the duty of the licensing justices to see that the licensed accommodation in their district does not on the whole exceed that which is required to satisfy the needs of the public. In most districts the policy of the justices is not to increase the licensed accommodation. In *Reg.* v. *Bowman* (2) the ground upon which the rule for a mandamus

(1) [1907] A. C. 420. (2) [1898] 1 Q. B. 663, 664, 666.

to the justices to hear and determine was made absolute was not that the justices had made it a condition that the applicant should surrender other licences, but that he should pay them a sum of money. It would seem that the justices before making an order for a new licence or for a renewal may require the surrender of another licence: see Paterson's Licensing Acts, 31st ed., p. 549, n. (g). The case of *Rex* v. *Shann* (1) is distinguishable. There applications were made to the same justices by the owners of two old beerhouses for the renewal of their licences. The justices were satisfied that only one of the licences was necessary, and they made the applicants bid against each other and granted the application of the applicant who was prepared to surrender the largest number of other licences in the district. In that case there was no suggestion of increased facilities for drinking, and the justices by renewing only one of the licences were doing away with an existing licence. It was not therefore necessary in the interests of the district to require the surrender of other licences, and it was rightly held that the justices were not entitled to do so.

Further, the justices were entitled to make it a condition of granting the application that the applicants should pay a sum in respect of monopoly value. If the proposed alteration in the premises were carried out, the facilities for drinking would be very greatly increased. The consent of the justices to the application would, therefore, be equivalent to the grant of a "new justices on-licence" under s. 14, sub-s. 1, of the Act, and, as in the case of an application under that sub-section, the justices might attach a condition for securing to the public the monopoly value created by the grant of the application.

Whiteley K.C. and *R. E. Otter* in support of the order nisi. On an application under s. 71 of the Act of 1910 for the consent of the licensing justices to an alteration in the licensed premises, the justices are not entitled to make it a condition of giving their consent that the applicants should surrender the licence of some other house or houses of theirs in the

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division. That section gives the justices an absolute discretion either to consent to the alteration or not to do so, but it gives them no power to impose conditions. Even on an application for a new licence, the justices, although they have power under s. 14, sub-s. 1, to attach certain conditions to the grant of the licence, are not entitled to require the surrender of another licence. It is not the intention of the Act that the justices should have power to attach to the granting of any application in respect of a licence a condition that the applicant should surrender some other licence or licences, inasmuch as the attachment of that condition would operate unfairly in favour of wealthy applicants who had many licences in the division. An applicant would not be likely to have an existing licence in the neighbourhood of the premises to which the application related, but even if he had he could not be required to surrender it.

The justices were not entitled on this application under s. 71 to take into consideration the fact that if the proposed alteration were made no monopoly value would be payable in respect of the increased drinking facilities thereby given. Sect. 14, sub-s. 1, of the Act of 1910, which re-enacts s. 4, sub-s. 2, of the former Licensing Act, 1904 (4 Edw. 7, c. 23), provides that the licensing justices, on the grant of a new justices' on-licence, may attach a condition that a sum shall be paid in respect of monopoly value; but all the attempts that have been made to extend that provision to cases other than that of the grant of a new on-licence have proved unsuccessful: *Reg.* v. *Bowman* (1); *Rex* v. *Drinkwater* (2); and *Rex* v. *Shann.* (3) This is a further attempt to extend that provision to a case to which it has no application.

The power of the justices under s. 71 is limited to considering whether the alteration as shown on the deposited plans ought to be made in the interests of their division.

LAWRENCE C.J. This is an order nisi for a mandamus to the justices for the Wandsworth division to hear and

(1) [1898] 1 Q. B. 663. (2) [1905] 2 K. B. 469.
(3) [1910] 2 K. B. 418.

determine an application under s. 71 of the Licensing (Consolidation) Act, 1910, for their consent to an alteration in an old beerhouse, the "Rose and Crown," belonging to the applicants. The need for the alteration arose in consequence of the fact that the London County Council, in carrying out an improvement in the district involving the widening of the road in which the beerhouse was situated, required a part of the ground upon which the beerhouse stood. A scheme was prepared by the County Council and the applicants to reconstruct the "Rose and Crown" and to throw part of the ground on which it now stands into the new roadway. An agreement was entered into between the applicants and the County Council by which the applicants agreed to effect a reconstruction, a plan of which was submitted, and the County Council agreed to contribute some portion of the expenses. It thus became necessary in order to carry out this scheme to apply to the licensing justices under s. 71 for their consent.

The licensing justices when the matter came before them said that they would not entertain it unless the applicants made a proposal to surrender the on-licence of some other house in the division; but that if the proposal were made to surrender the licence of another house, however small, in the division, they would be prepared to consider the application. They said that after they had had a view of the premises with the plans before them. In my opinion the justices were not entitled to make it a condition of their entertaining the application that the applicants should surrender the licence of another house somewhere in the division.

The chairman of the justices has made an affidavit in which he defends the position they took up by saying that they would lose the monopoly value, or the opportunity of getting monopoly value, if the premises were reconstructed in accordance with the plans, as the licensed area of the premises would be so largely increased that the improvement would be practically "equivalent to the grant of a new licence." I do not think that that is either a legitimate statement or a

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true statement. I do not think that the sanctioning of the proposed alteration would be either in law or in fact equivalent to the grant of a new licence, or that the chairman was entitled to bring that consideration into the matter. He had to consider the needs of the neighbourhood for the supply of intoxicating liquor, and the nature of these proposed improvements, and to come to a decision on the merits of the proposed improvements, whether they ought or ought not to be allowed. In making it a condition of granting the application for consent to the alteration that the applicants should surrender the licence of another house somewhere in the division, and in justifying this course on the ground that not to impose the condition would have an effect on their getting monopoly value, it seems to me that the justices were applying their minds to the wrong point and refusing the application upon grounds which were not admissible.

If there had been a small house or an inconvenient house in the immediate neighbourhood, so that if the proposed alteration were made the applicants would be supplying liquor from two sources to the same portion of the community, I should have great doubt whether the justices might not ask for a surrender of that small house. Mr. Whiteley contends that they could not do that. I do not now decide whether they could or could not do so. That is a question which may arise in the future, and I reserve it for future consideration. But that the justices were not entitled to do what they did here—namely, bargain to get a surrender of a house somewhere in the division—seems to me to be clear upon the authorities that have been cited, particularly the judgment of Farwell L.J. in *Rex* v. *Shann* (1) in the Court of Appeal. In my opinion the order nisi for a mandamus should be made absolute.

DARLING J. I agree with what my Lord has said, but I go a little further. It seems to me after having read Mr. Muggeridge's affidavit, paras. 11 and 13 in particular, that what the justices did here plainly amounted to a refusal

(1) [1910] 2 K. B. 418.

to hear and determine the application which was made to them. It is stated in para. 11 of the affidavit that when the matter came before them the justices stated that the application would not be granted unless the surrender of an on-licence in the Wandsworth district, however small, were agreed to. Then there was a subsequent deliberation and meeting between the applicant and the justices and in para. 13 Mr. Muggeridge says: "Whilst the facts in that case [*Rex* v. *Shann* (1)] were being stated the chairman intervened saying 'We have made no proposal. We have asked you to make a proposal. We are prepared to consider this matter upon an offer being made.'" The applicants came to the justices with the desire to make an application just as anybody desiring to make an application might come to this or any other Court. The justices said that they would not consider the application unless the applicants first agreed to a condition which the justices desired to impose. Whether the condition was one which the justices could, or could not, impose, it appears to me that by requiring it they in effect refused to consider the application on its merits. In the early Middle Ages I believe it was useless for a person to come to Court unless he brought a gift with him. The suitor put down his money not to influence the judgment but to secure a hearing: see McKechnie, Magna Carta, 2nd ed., 395. It was not that justice was sold. It was that the suitor was entitled to the justice of the King's Court, superseding the local popular Court, only as a matter of grace. That was regularised, as I understand history, by the charge of certain definite fees to those who came to make an application, it being very wisely provided that the fees should not go to the judge, and, as the King's authority and the King's Courts became better established, rules were at length laid down prescribing the mode in which applications might be made and the necessary preliminaries thereto. In the present case it seems to me there was something in the nature of an attempt to return to the procedure of less civilised times. A legal tribunal is bound to hear and determine an

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application in accordance with the ordinary rules of justice. When a person comes before the tribunal to make an application it is not entitled to say that it has no proposal to make, but that before it hears his application it wants to know what proposal he has to make to it in the way of parting with something which belongs to him; and when he says that he is not prepared to make a proposal the tribunal is not entitled to reply that it will not hear his application. That is what the justices did here, and it seems to me that in so doing they were wrong. I therefore think that this rule should be made absolute.

AVORY J. I agree that this rule for a mandamus should be made absolute. I prefer to base my judgment entirely upon the admission made by the chairman of the justices in para. 4 of his affidavit, in which he says that the justices took into consideration the fact that if the premises were reconstructed in accordance with the plans the licensed area would be considerably increased and greater facilities for the sale of intoxicating liquor would be provided, which would be equivalent to the grant of a new licence, whilst no monopoly value would be payable in respect thereof; and that the justices also took into consideration the fact that there is a considerable area of land in the vicinity of the premises which may ultimately be built upon, and if at any future time it became necessary to grant an additional licence in the neighbourhood of the said premises the monopoly value then obtainable would be reduced if the said premises were reconstructed in accordance with the plans. In my opinion in taking into consideration the monopoly value either of these premises or of some hypothetical premises that might be built in the future the justices were allowing themselves to be influenced by extraneous considerations which ought not to have influenced them in dealing with this application. On that ground alone the order nisi should be made absolute for a mandamus directing them to hear and determine the application according to law.

I wish to make one further observation. If the case had

depended solely upon the statement of facts contained in the affidavit of Mr. Muggeridge for the applicants, and if I had come to the conclusion that what was said by the chairman of the justices at the meeting on February 4 was consistent with the view that the justices were only proposing to consider an offer for the surrender of some other licence in the immediate neighbourhood of the existing house, I should not have been prepared on that ground alone to say that this rule should be made absolute. I desire to say that, as at present advised, I do not assent to the view which has been put forward by Mr. Whiteley that neither under s. 71 nor on the application for a new licence are the justices entitled to consider, or to invite, the surrender of existing licences. I reserve my final judgment upon that point, but I wish to say that my present view is not in accordance with that which has been put forward by Mr. Whiteley.

The order for a mandamus should be made absolute.

Order absolute.

Solicitors for the justices: *Wetherfield, Baines & Baines.*
Solicitors for applicants: *Martineau & Reid.*

J. R.

Distinguished. ROBERTSON *v.* MINISTER OF PENSIONS. [1948] 2 All E.R. 767.

Distinguished. ROBERTSON *v.* MINISTER OF PENSIONS [1949] 1 K. B. 227

1921
July 27.

REDERIAKTIEBOLAGET AMPHITRITE *v.* THE KING.

Petition of Right—Contract by Crown fettering its executive Power—Obligatory Force of.

During the war neutral shipowners, being aware of the liability of neutral ships to be detained in British ports, obtained an undertaking from the British Government that if they sent a particular ship to this country with a particular class of cargo she should not be detained. On the faith of that undertaking the owners sent the ship to a British port with a cargo of the stipulated kind. The British Government subsequently withdrew their undertaking and refused her clearance. On a petition of right for damages for breach of contract:—

Held, that the Government's undertaking was not enforceable in a Court of law, it not being within the competence of the Crown to make a contract which would have the effect of limiting its power of executive action in the future.

TRIAL of a petition of right before Rowlatt J.

The suppliants, who were a Swedish steamship company owning a ship called the *Amphitrite*, were in the year 1918 minded to trade with her to the United Kingdom. In consequence of the intensified blockade of British ports by the Germans an arrangement had been made between the British Government and the Governments of neutral countries that neutral ships in British ports should be allowed to leave only if they were replaced by other ships of the same tonnage, which arrangement was known as the "ship for ship" policy. The suppliants, having had two of their own ships detained in British ports under that ship for ship policy, were anxious to avoid such detention in the future, and accordingly they wrote on March 8, 1918, to the British Legation at Stockholm with reference to the *Amphitrite*: "We should be disposed to put her in trade between Sweden and England in case you could give us a guarantee that the boat should be allowed free passage without being detained in Great Britain." The Legation communicated with the proper authority in this country, and on March 18 replied: "I am instructed to say that the S.S. *Amphitrite* will earn her own release and be given a coal cargo if she proceed to the United Kingdom with a full cargo consisting of at least 60% approved

goods." The suppliants then sent the *Amphitrite* with a cargo of approved goods to Hull, where she discharged during the month of May, and having loaded a cargo of coal she obtained her release and returned to Sweden. Before she so returned her owners were in some doubt whether the undertaking of March 18 applied only to the particular voyage then contemplated and required to be renewed for any subsequent voyage. They accordingly asked the British Legation for information on that point, and received a reply dated May 9, 1918, that " the S.S. *Amphitrite* will be allowed to release herself in her next voyage to the United Kingdom." On the faith of the undertaking contained in that letter the suppliants again loaded the *Amphitrite* with an approved cargo and sent her to Hull. Having discharged her cargo she went to the Forth in July to load coal for the return voyage. While she was there her owners received notice from the Government that loading facilities were withdrawn and that clearance would not be granted, unless the application therefor was made through a certain body called the Swedish Shipping Committee. Owing to an agreement that had been made between the suppliants and the German Government the former had disqualified themselves from making application for clearance through the Swedish Shipping Committee, with the result that the *Amphitrite* was detained in this country, and eventually her owners, to avoid further loss, sold her. In these circumstances the suppliants presented this petition of right, claiming damages for the breach of the Government's undertaking contained in the letters of March 18 and May 9. The Crown in its answer and plea denied that the said letters amounted to an enforceable contract.

R. A. Wright K.C. and *Balloch* for the suppliants. The two letters of March 18 and May 9 contain all the elements of a contract. There is a definite promise and abundant consideration. The British Government wanted a cargo of approved goods to be brought here, and having had the benefit of the performance of the contract they ought not

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to be allowed to repudiate it. It is not disputed that the undertaking, such as it is, was made with the full authority of the Crown.

Giveen (*Sir Gordon Hewart A.-G.* with him) for the Crown. The granting of clearance to a ship cannot be made the subject of a contract. The question whether such clearance can be granted must depend upon the military exigencies at the time that it is applied for. That being so the letters in question must be read as nothing more than an expression of intention to allow clearance if the existing conditions continued. They cannot be regarded as fettering the Government's action however much the military conditions may have altered in the interval.

Balloch in reply.

ROWLATT J. In this case the suppliants are a Swedish shipowning company who sue the Crown by petition of right for damages for breach of contract, the breach being that the ship *Amphitrite* was refused a clearance to enable her to leave this country, when she had entered a British port under an arrangement whereby she was promised that she should be given that clearance. Now undoubtedly the suppliants desired to get the clearest and most binding assurance that was possible. Their vessel was free; they might have employed her elsewhere; and they had experience of the difficulties encountered by foreign ships in getting away from this country when once they had come here. Accordingly they wrote on March 8, 1918, to the British Legation at Stockholm and asked whether, in the event of the vessel being put in trade between Sweden and England, the Legation could give them a guarantee that she would be allowed free passage without being detained in Great Britain. The Legation replied that they were "instructed to say that the S.S. *Amphitrite* will earn her own release and be given a coal cargo if she proceed to the United Kingdom with a full cargo consisting of at least 60% approved goods." That reply was given by the British Legation after consulting the proper authorities, and I must take it that it was given with

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the highest authority with which it could be given on behalf of His Majesty's Government. And the British Government thereby undertook that if the ship traded to this country she should not be subjected to the delays which were sometimes imposed. The letters in which that undertaking was contained were written with reference to an earlier voyage which was allowed to go through, the undertaking being on that occasion observed. But the undertaking was renewed with respect to the voyage in connection with which the present complaint arises by a letter from the British Legation, in which it was stated that "the S.S. *Amphitrite* will be allowed to release herself in her next voyage to the United Kingdom"—that is to say, upon the same terms as before. Now under those circumstances what I have to consider is whether this was a contract at all. I have not to consider whether there was anything of which complaint might be made outside a Court, whether that is to say what the Government did was morally wrong or arbitrary; that would be altogether outside my province. All I have got to say is whether there was an enforceable contract, and I am of opinion that there was not. No doubt the Government can bind itself through its officers by a commercial contract, and if it does so it must perform it like anybody else or pay damages for the breach. But this was not a commercial contract; it was an arrangement whereby the Government purported to give an assurance as to what its executive action would be in the future in relation to a particular ship in the event of her coming to this country with a particular kind of cargo. And that is, to my mind, not a contract for the breach of which damages can be sued for in a Court of law. It was merely an expression of intention to act in a particular way in a certain event. My main reason for so thinking is that it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State. Thus in the case of the employment of public servants, which is a less strong

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case than the present, it has been laid down that, except under an Act of Parliament, no one acting on behalf of the Crown has authority to employ any person except upon the terms that he is dismissible at the Crown's pleasure; the reason being that it is in the interests of the community that the ministers for the time being advising the Crown should be able to dispense with the services of its employees if they think it desirable. Again suppose that a man accepts an office which he is perfectly at liberty to refuse, and does so on the express terms that he is to have certain leave of absence, and that when the time arrives the leave is refused in circumstances of the greatest hardship to his family or business, as the case may be. Can it be conceived that a petition of right would lie for damages? I should think not. I am of opinion that this petition must fail and there must be judgment for the Crown.

Judgment for the Crown.

Solicitors for the suppliants: *Botterell & Roche.*
Solicitor for the Crown: *Treasury Solicitor.*

J. F. C.

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July 28.

FEW AND ANOTHER (APPELLANTS) *v.* ROBINSON (RESPONDENT).

Adulteration—Sale to Prejudice of Purchaser—Milk—Deficiency in stipulated Percentage of Milk Fat—Milk sold in Condition in which it came from Cow—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Sale of Food and Drugs Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 3.

A farmer, being under contract to supply milk containing a specified percentage of fat, delivered milk which contained a less percentage. The milk was in the same condition as that in which it came from the cow. On a prosecution under s. 6 of the Sale of Food and Drugs Act, 1875, for selling to the prejudice of the purchaser milk not being of the nature, substance, and quality demanded:—

Held, that as the milk was not adulterated either by the addition of something to, or the abstraction of something from, the natural

product of the cow, the mere fact that it was not of the quality contracted for by the purchaser did not make the sale an offence against the section.

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CASE stated by the Middlesex Quarter Sessions.

The appellants, Henry and Oliver Few (1), were convicted by the justices at Feltham of having sold to the prejudice of the purchasers certain milk which was not of the nature, substance, and quality demanded, contrary to s. 6 of the Sale of Food and Drugs Act, 1875. On appeal the quarter sessions quashed the conviction subject to a case for the opinion of the Court.

On the hearing of the appeal no evidence was called, the facts being admitted by the parties.

The appellants are dairy farmers at Staines, and the respondent is the chief of the Public Control Department of the Middlesex County Council.

On March 26, 1920, the appellants entered into a contract with the Board of Management of the West London District School at Ashford to supply their school with "best genuine and unskimmed new milk of such quality as shall contain not less than 3·5 per cent. by weight of milk fat."

On May 20, 1920, at 9 A.M. an employee of the appellants in pursuance of the said contract brought from the appellants' farm to the school one churn containing ten gallons of milk, and was met at the school by a duly qualified inspector of the county council acting as agent for the respondent under the Sale of Food and Drugs Acts, who informed the appellants' employee that he intended to take a sample of the milk in course of delivery under s. 3 of the Sale of Food and Drugs Act, 1879. The inspector plunged the milk, and took a pint of it from the churn. The milk was duly submitted to the public analyst, who certified that the sample only contained 2·9 per cent. of fat, whereas according to the demand of the purchasers it should have contained 3·5 per cent. of fat.

(1) The expressions "appellants" and "respondent" are throughout this report used to indicate the parties who were respectively appellants and respondent before the quarter sessions.

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On June 10, 1920, the appellants were summoned before the Feltham justices. At the hearing the above facts were proved or admitted. It was also proved that the milk in question had been delivered at the school in the same condition as given by the cows. The justices found the appellants guilty.

On the hearing of the appeal it was contended on behalf of the appellants, that when the inspector procured the sample of milk in course of delivery to the Board of Management he became himself the purchaser within the meaning of s. 6 of the Sale of Food and Drugs Act, 1875; that the inspector did not demand milk of any specified quality, and no representation of quality was made to him; that the milk supplied to the inspector was of the nature, substance, and quality impliedly demanded by such purchaser; and that as the milk was delivered in the same condition as given by the cows the appellants could not be convicted of an offence under s. 6.

The quarter sessions held that they were not entitled to look at the contract, and that as the milk was supplied as it came direct from the cows no offence had been committed, and they accordingly allowed the appeal.

Whiteley K.C. and *Wrottesley* for the respondent. The inspector was not a purchaser of the milk. Where an inspector procures a sample of milk in accordance with s. 3 of the Sale of Food and Drugs Act, 1879, there is no sale to him within the meaning of s. 6 of the Act of 1875. He does not pay for the sample as he does where he procures it under s. 13 of the Act of 1875. Proceedings no doubt are to be taken under s. 3 "as if such inspector . . . . had purchased the same"; but that expression shows that he is not the purchaser in fact. Then in order to establish that the quality is not what was demanded by the purchaser you must look at the terms of the contract with the real purchaser to whom the milk was sold. The inspector must when procuring the sample under s. 3 be understood to demand that the milk delivered to him shall be of a quality that will satisfy

the terms of that contract. Here the quality of the sample was lower than that contracted for. The quarter sessions were of opinion that as the milk delivered was in the same condition as when it left the cow the case was covered by the authority of *Hunt* v. *Richardson*. (1) But that case is distinguishable. There the contract was to supply "new morning milk," nothing being said about the quality. Though the milk delivered was abnormally deficient in fat, yet, in the absence of a finding that it was so deficient as to render it unmerchantable under the name of milk, and as it was in fact that morning's milk delivered as it came from the cow, the purchaser got all that he asked for. But in the present case there was a breach of the express contract as to the quality of the milk to be supplied. Avory J., who was one of the majority of the judges in favour of quashing the conviction in that case, took that distinction, and adopted a passage in Lord Salvesen's judgment in *Scott* v. *Jack* (2), where he said: "If the purchaser had demanded sweet milk containing 3 per cent. of milk fat or upwards and had got milk of a poorer quality, an offence might have been committed; but the only demand here made was for sweet milk, and sweet milk unadulterated and not in any way tampered with was what was supplied." The result is that as two of the judges in *Hunt* v. *Richardson* (1), Bray and Scrutton JJ., were of opinion that adulteration was not essential to an offence under s. 6 at all, and as a third would have upheld a conviction upon the facts of the present case, so far from *Hunt* v. *Richardson* (1) being an authority against the present respondent it is inferentially in his favour. The language of s. 6 is perfectly general: "No person shall sell to the prejudice of the purchaser any article of food . . . . which is not of the . . . . quality of the article demanded by such purchaser." It is not confined to cases of absence of quality resulting from adulteration. That was expressly decided in *Knight* v. *Bowers* (3), where it was held to be an offence against the section to supply savin under a

(1) [1916] 2 K. B. 446. (2) 1912 S. C. (J.) 87, 100.
(3) (1885) 14 Q. B. D. 845.

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contract for the sale of saffron although the savin was unadulterated.

Holman Gregory K.C. and *Ricardo* for the appellants were not called upon, but referred to *Williams* v. *Rees* (1) as negativing the suggested distinction between *Hunt* v. *Richardson* (2) and the present case, it having been there held that even where milk was of so poor a quality that it was not merchantable as milk, if it was in fact unadulterated the seller could not be convicted under the section.

LAWRENCE C.J. In this case the appellants were convicted before justices of an offence under s. 6 of the Act of 1875 and s. 3 of the Act of 1879. The position was this: The milk as delivered to the inspector was genuine milk as it had come from the cow. Nothing had been added to or taken from the milk, but it was being delivered under a contract made in April, 1920, which provided that the milk supplied should contain not less than 3·5 per cent. of milk fat. The inspector procured a sample of the milk and submitted it to the analyst, who certified that it contained only 2·9 per cent. of fat. Of course he knew nothing about the terms of the contract or about the stipulations which the purchasers had made with regard to the quality of the milk to be supplied. But Mr. Whiteley has contended that the inspector by taking a sample of the milk demanded milk in accordance with the contract, and that as on the analyst's certificate this milk was not in accordance with the terms of the contract, the justices were right in convicting. His contention was that any breach of the contract in respect of the quality of the milk would constitute an offence within the statute upon a demand by the inspector. I do not think that that is so. I think that where the milk is not adulterated by the addition of anything to it or the abstraction of anything from it, but is in the same condition as that in which it came from the cow, the fact that it is of a lower quality than that stipulated for does not make the delivery of it an offence against s. 6 of the Act of 1875 or s. 3 of that of 1879. These

(1) (1917) 87 L. J. (K. B.) 639. (2) [1916] 2 K. B. 446.

Acts are expressly directed against adulteration either by adding something to or taking something from the article contracted for, and the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), gave the Board of Agriculture power to make regulations for determining what deficiency in any of the normal constituents of genuine milk should raise a presumption, until the contrary was proved, that the milk was not genuine. In pursuance of that power the Board made a regulation that the fact of milk containing less than 3 per cent. of fat should raise that presumption. But Mr. Whiteley says that even if the contrary be proved, and if it be shown that the milk is genuine in the sense that it is not adulterated, that fact will afford no defence if the milk be of a less good quality than that expressly contracted for. To my mind that contention is contrary to the intention of the Act, and is moreover extremely inexpedient. It is better that the civil rights of the contracting parties should be kept distinct from their criminal remedies under the statute. I think that the order of the quarter sessions quashing the conviction must be affirmed.

BRAY J. I agree. Two questions are raised by this case, one as to what was the quality demanded by the inspector, and the other whether, supposing there was a breach as to the quality contracted for, it is not sufficient to show that the milk in question had been delivered at the school in the same condition as that in which it was given by the cow. I desire to say nothing about the first point, as we did not hear Mr. Gregory upon it; but it is one which may have to be decided before long. On the other point it seems to me that we are bound by the judgments of the Court in *Hunt* v. *Richardson* (1) and *Williams* v. *Rees*. (2) In the former of those cases I was one of the dissentient members of the Court. The point in controversy between us was whether the statute required proof that there was an adulteration, which meant, in the case of a natural product like milk, that something had been added to it or abstracted from it. The majority of

(1) [1916] 2 K. B. 446. (2) 87 L. J. (K. B.) 639.

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the Court there clearly decided, against the view expressed by Scrutton J. and myself, that proof of adulteration in the sense I have mentioned was necessary. Here there was no evidence of any such adulteration. The quarter sessions therefore were right in allowing the appeal.

SANKEY J. I agree. As far as the sale of milk is concerned I think that since *Hunt* v. *Richardson* (1) it must be taken that to create an offence under s. 6 of the Act of 1875 it must be shown that the milk has been adulterated either by the addition of some foreign substance or the abstraction of one of its constituent elements. This I think is clear from the judgments of the present Lord Chief Justice and Darling J., although perhaps it may be said that, having regard to his remarks on pp. 453 and 454 of the report, it is not quite so clear from the judgment of Avory J. But the later case of *Williams* v. *Rees* (2) is a distinct authority that there must be adulteration in the ordinary sense of the word before the prosecution can be successful in respect of a sale of milk. In the case before us it is found that there was no such adulteration. The milk was delivered in the same condition as that in which it was given by the cow. Therefore I think the order of quarter sessions cannot be disturbed. In my view a mere breach of contract as to quality does not necessarily create an offence within s. 6. I express no opinion on the other point raised by the appellants.

Order of quarter sessions affirmed.

Solicitor for the respondent: *E. S. Freeland.*
Solicitor for the appellants: *Wilfrid Firth.*

(1) [1916] 2 K. B. 446. (2) 87 L. J. (K. B.) 639.

J. F. C.

[IN THE COURT OF APPEAL.]

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Feb. 23, 24; *March* 22.

OLDHAM, ASHTON AND HYDE ELECTRIC TRAMWAYS, LIMITED *v.* ASHTON CORPORATION AND OTHERS.

Tramway—Purchase of Undertaking by local Authority—Items constituting Value—Engineer's Remuneration—Interest on Capital during Construction—Cost of raising Capital—Preliminary Expenses—Cost of Obligation imposed by Order authorizing Tramway—Depreciation—Tramways Act, 1870 (33 *&* 34 *Vict. c.* 78), *s.* 43.

Local authorities under the powers conferred on them by s. 43 of the Tramways Act, 1870, gave notice to a tramway company to sell to them their tramway. In determining the "then value" of the tramway within the meaning of the section and in the manner prescribed in *Edinburgh Tramways Co.* v. *Lord Provost, &c., of Edinburgh* [1894] A. C. 456, the arbitrator allowed to the company (1.) a sum in respect of the cost of raising capital; (2.) a sum in respect of interest on capital during construction; and he held that neither of these two sums was subject to depreciation; but (3.) that a sum which he allowed in respect of the cost of engineering was subject to depreciation. The arbitrator further allowed a sum in respect of the expenditure on alterations to a bridge in the following circumstances. In the Order authorizing the construction of the tramway a provision was inserted at the instance of a railway company, over whose lines the tramway passed by a bridge, that if the railway company required at any time to make structural alterations to the bridge, the promoters should temporarily divert the tramway. Some years afterwards the railway company did so require, and the tramway was temporarily diverted:—

Held, by Scrutton and Atkin L.JJ., that the cost of raising capital could not be allowed.

The dissenting judgment of Sir James Woodhouse on this point in *National Telephone Co.* v. *Postmaster-General* (1913) 29 Times L. R. 190 approved.

By Bankes L.J. The finding of the arbitrator on this point could not be interfered with.

Held, also, by the whole Court, that the cost of diversion of the bridge could not be allowed; that the interest on capital during construction should be subject to depreciation in so far as the capital on which it was the interest was subject to depreciation—that is to say, according to whether the capital was spent on depreciating things, such as rails, or on a non-depreciating thing, such as excavation; and that the decision of the arbitrator that the cost of engineering should be subject to depreciation was a decision on a question of fact, with which the Court could not interfere.

Decision of Rowlatt J. [1921] 1 K. B. 269 affirmed.

APPEAL from the judgment of Rowlatt J. upon an award stated in the form of a special case; reported [1921] 1 K. B. 269.

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In 1896 the British Electric Traction (Pioneer) Co., Ld. (called herein "the promoters"), obtained an Order, the Oldham, Ashton, Hyde and District Electric Tramways Order, 1896, under which certain tramways were constructed, and the Oldham, Ashton and Hyde Electric Tramways, Ld. (herein called "the company"), had become at the date of notice hereinafter mentioned the owners of these tramways with the benefit of the rights and subject to the obligations created by the said Order.

In 1918 on a date agreed as May 1, 1918 (called herein "the date of notice"), the corporations of Ashton-under-Lyne and Hyde and the Audenshaw and Denton Urban District Councils (called herein "the purchasing authorities"), under the powers conferred by s. 43 of the Tramways Act, 1870 (1), gave notice in writing (called herein "the said notice") to the company that they required them to sell to them such parts of the tramway undertaking as were within the respective districts of the purchasing authorities (called herein "the tramway"). Differences arose between the parties within the meaning of s. 43, and were referred to arbitration, and the arbitrator, Sir Maurice Fitzmaurice, stated his award in the form of a special case.

(1) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 43: "Where the promoters of a tramway in any district are not the local authority, the local authority . . . . may within six months after the expiration of a period of twenty-one years from the time when such promoters were empowered to construct such tramway . . . . by notice in writing require such promoters to sell, and thereupon such promoters shall sell to them their undertaking, or so much of the same as is within such district, upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district, such value to be in case of difference determined by an engineer or other fit person nominated as referee by the Board of Trade on the application of either party. . . . ."

By s. 5 of the Ashton-under-Lyne Corporation Act, 1917 (7 & 8 Geo. 5, c. xlii.), application might be made by the local authorities under the Special Acts (Extension of Time) Act, 1915 (5 & 6 Geo. 5, c. 72), for the extension of the period of twenty-one years mentioned in s. 43 of the Tramways Act, 1870; and the said period was extended.

The arbitrator in para. 11 of the case awarded 142,174*l.* as the "then value," at the date of notice, of the "purchased undertaking" (other than certain loose tools, etc.) "exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale or other consideration whatsoever except the consideration of the value of the purchased undertaking measured by what it would cost to construct and establish the purchased undertaking" on the date of notice "if such purchased undertaking had not existed at that date, but taking into account a proper deduction in respect of depreciation as hereinafter mentioned."

The above sum was made up as follows:—

	£	*s.*	*d.*
(A) Value of permanent way, overhead electric equipment, cables and cars, less an agreed deduction of 3600*l.* ..	110,396	0	0
(B) Value of lands, buildings, office furniture and fittings, car shed track, car shed equipment, etc.	10,717	0	0
(C) Value of plant, tools and fittings and car shed and plant and fittings belonging to the Tramway Co. at Ashton Power Station	2906	0	0
(D) Amount allowed for Parliamentary expenses	3000	0	0
(E) Amount allowed for preliminary expenses	1500	0	0
(F) Amount allowed for miscellaneous items	2395	0	0
(G) Amount allowed for cost of raising capital	5500	0	0
(H) Amount allowed for interest on capital during construction	5760	0	0
	£142,174	0	0

There was no dispute in the case as to items (B), (C) or (D). The questions for the arbitrator may be summarized as

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follows (the relevant paragraphs of the special case are set out hereunder): (1.) Whether an item for "engineering" included in (A) should be subject to depreciation. (2.) Whether certain expenses in the formation of the promoting company, and certain preliminary expenses, directors' fees and managerial expenses in (E) and (F) should be allowed, and, if allowed, should be subject to depreciation. (3.) Whether (G) and (H) should be allowed, and if so whether subject to depreciation.

Para. 14: Counsel for the purchasing authorities contended: "that for the purpose of determining the cost of constructing and establishing the purchased undertaking as on" the date of notice:—

"(1.) The allowance for engineering should be subject to depreciation. The ground for this contention was that it would not be right to add this allowance to the value as determined by me (the arbitrator) of the items carrying the percentage for engineering without deducting something from such addition by way of allowance for the fact that part of the life of such items had gone.

"(2.) I (the arbitrator) was not entitled to consider and take into account the following items of the company's claim and that the same were legally inadmissible, namely, (A) Certain formation expenses of the company. (B) Certain expenditure by the company on directors' fees and other managerial expenses. (C.) The preliminary expenses in connection with the company. (D) The cost of raising capital. The grounds for this contention in respect of the above items (A), (B) and (C) were as follows: (*a*) That such expenditure was not part of the cost of establishing the tramway as a structure, but was part of the cost of establishing the commercial undertaking which was to operate the tramway. (*b*) That no part of such expenditure was an element of the value of the purchased undertaking to the purchasers, who would not become owners of the company. (*c*) That there was no advantage enuring to the benefit of the purchasers or enhancing the value of the tramway as a structure by reason of the substitution of the company for the promoters

to whom parliamentary powers were granted. The grounds for the contention in respect of the above item (D)—namely, the cost of raising capital—were grounds (*a*) and (*b*) set out above, and further (*d*) That there was no evidence that the purchasers would have had to incur such costs, but that on the contrary there was evidence that the purchasers could have borrowed the necessary sum for the construction and establishment of the purchased undertaking on the " date of notice " without commission or other capital expenditure. It was further contended in the alternative that if any expenses and costs in respect of the above items (A), (B), (C) and (D), should be taken into account they should be subject to depreciation, and it would be reasonable to treat them as written off during the 21 years of the concession.

" (3.) The company were not entitled to any sum in respect of interest on capital during construction, and I was not entitled to consider and take into account any such claim. The grounds for this contention were as follows: (*a*) That such interest formed no part of the ' then value ' of the purchased undertaking within the meaning of s. 43 of the Tramways Act, 1870. (*b*) That there was no evidence that such interest in fact formed part of the cost of construction or was in fact paid during construction. (*c*) That neither " the promoters " nor the company had any power to pay dividends out of capital during the period of construction and that while the measure of value was the cost of establishing and constructing the purchased undertaking as on the " date of notice " such value could not be deemed to be enhanced by reason of the power to pay dividends out of capital having been conferred by legislation subsequent to the said Order. It was further contended in the alternative that, if any such interest should be considered and taken into account, it should be subject to depreciation, and it would be reasonable to treat it as written off during the 21 years of the concession.

" (4.) A sum of money claimed by the company in respect of expenditure incurred in accordance with the obligations created by the said Order with regard to certain alterations

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made in the year 1906 to a railway bridge known as Guide Bridge could not be considered and taken into account by me. The ground for this contention was that such expenditure formed no part of the value of the purchased undertaking as on the " date of notice. " It was further contended in the alternative that, if such expenditure should be taken into account, it should be subject to depreciation."

Para. 15: Counsel for the company contended : "(1.) That the allowance for engineering should not be subject to depreciation. (2.) That the items set out in paragraph 14 (2.) hereof were all legally admissible, and that I ought to consider the same and take them into account in determining the 'then value' of the purchased undertaking within the meaning of s. 43 of the Tramways Act, 1870, and that none of the said items should be subject to depreciation. (3.) That interest on capital during construction was a matter which I ought to consider and take into account in determining the 'then value' of the purchased undertaking, and that there was evidence that such interest in fact formed part of the cost of construction, and further that such interest should not be subject to depreciation. (4.) That the said sum expended in connection with the alterations to Guide Bridge ought to be considered and taken into account in determining the 'then value' of the purchased undertaking, and that any sum so allowed should not be subject to depreciation."

In para. 16 the arbitrator stated that he was of opinion : (1.) That he ought to depreciate the engineering item on the ground that it should be treated in the same way as other items of cost of construction in respect of the structure of the purchased undertaking which did not represent expenditure made once for the whole life of the undertaking. (2.) That the company were not entitled to the sums claimed in respect of formation expenses and expenditure on directors' fees and other managerial expenses on the ground that he ought to disregard specific items of expenditure under these heads and merely include in his valuation such sum as he considered " would be properly and reasonably spent on

preliminary expenses by any one undertaking the construction and establishment of the purchased undertaking." (3.) That the company were entitled to a sum in respect of preliminary expenses as part of the necessary cost of construction and establishment and represented expenditure which would be incurred by any one undertaking the construction and establishment, and that he "ought accordingly to take such expenses into account to such an extent as I considered necessary and proper." (4.) "That the company were entitled to receive a sum in respect of the cost of raising capital on the ground that such cost was part of the necessary cost of construction and establishment of the purchased undertaking and represented expenditure which would have to be incurred by any one in good credit undertaking such construction and establishment as aforesaid, and that I ought accordingly to take it into account to such an extent as I considered necessary and proper." (5.) That the company were entitled to a sum in respect of interest on capital during construction as part of the necessary cost of construction and establishment. (6.) That the sum expended on Guide Bridge should be taken into account as being incurred in pursuance of obligations created by the said Order. (1) In consequence of certain structural alterations of the bridge made in 1906, some eight years after the construction of the tramway, the company had for a time to divert the tramway over a temporary bridge under the provisions of the Order. The arbitrator further held that the items mentioned in clauses (3.), (4.), (5.) and (6.) of this

(1) Oldham, Ashton-under-Lyne, Hyde and District Electric Tramways Order, 1896 (scheduled to the Tramways Orders Confirmation (No. 2) Act, 1896 (59 & 60 Vict. c. clxvi.)), s. 8, sub-s. 4: "Whenever and so often as the company," that is the railway companies whose lines the tramway crossed by Guide Bridge, "shall require to widen, lengthen, strengthen" and make any specified structural alterations to the bridge, "and they shall find it necessary for effecting any of such purposes that the working and user of any of the said tramways over such bridge . . . . shall be wholly or partly stopped or delayed or that such tramways shall be temporarily diverted . . . ." this shall be done "accordingly at the expense of the promoters and under the superintendence of their engineer. . . . ."

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paragraph " were not subject to depreciation on the ground that they represented expenditure made once for the whole life of the purchased undertaking, and ought to be treated on the same basis as Parliamentary expenses and the cost of excavation, both of which last-mentioned items it was conceded were not subject to depreciation."

In the event of the Court holding that he was wrong as to any of the above items, he made alternative awards as to each. He awarded the above, and in addition the value of certain stores, spare parts and loose tools, the whole representing the " then value " of the " purchased undertaking " within the meaning of s. 43 of the Tramways Act, 1870. (1)

Rowlatt J. held that: (1.) the remuneration of the engineer should be subject to depreciation; (2.) interest on capital during construction should be allowed as an accretion to the capital, and depreciable or not with the capital on which it was the interest; but that the cost (3.) of raising capital and (4.) of the temporary diversion of the tramway over Guide Bridge should not be allowed.

The company appealed on these four points.

Tomlin K.C. and *Hon. E. E. Charteris K.C.* for the appellants. The principle upon which " the then value of the tramway " within the meaning of s. 43 of the Tramways Act, 1870, is to be assessed is that laid down in *Edinburgh Tramways Co.* v. *Lord Provost, &c., of Edinburgh* (2), a decision which was followed in *London Street Tramways Co.* v. *London County Council* (3)—namely, that " the then value of the tramway " must be measured by what it would cost at the date of the sale to construct the lines, subject to a deduction for depreciation. In applying that principle to the present case there are four items now in dispute. It is contended that they all raise questions of fact and not of law, and that the award, with which the appellants are content, should stand.

(1) The objection to the allowance for preliminary expenses was withdrawn before Rowlatt J.

(2) [1894] A. C. 456.

(3) [1894] A. C. 489.

The first item is "engineering"—that is, fees paid to the engineer when the tramway was constructed. That item is admitted, the only question in dispute being whether it is to be subject to depreciation. It is submitted that it is not. It is a once-for-all expense incurred when the tramway was constructed.

The next item is interest on capital during construction. The only question is whether this should be subject to depreciation. It is a once-for-all expense, which will not recur, and is not depreciable.

As to Guide Bridge, this also is a once-for-all expense, the benefit of which accrued to the appellants. The obligation to pay the expense of altering the bridge if the railway company desired to widen the railway was imposed on the tramway company as a condition of getting statutory power to construct the tramway. The alteration was in the structure itself. The expense comes within the same principle as preliminary expenses, which are admitted. It is like widening a road to allow the tramway to be constructed. If the work had not been done before the purchase by the local authorities, the local authorities would have been under the obligation to do the work. This class of expenditure has always been allowed, and there is nothing in the *Edinburgh Tramways Case* (1) or in the *London Tramways Case* (2) which is inconsistent with this practice. The expense of widening a road when a tramway is laid in it, if incurred, would be allowed: *London, Deptford, and Greenwich Tramways Co.* v. *London County Council.* (3)

As to the cost of raising capital, it is a once-for-all expense, like the preliminary expenses: see *In re Manchester Tramways Co. and Ashton-under-Lyne Corporation.* (4) It is part of the cost of constructing the tramway. Capital is as necessary as labour for constructing a tramway. It was allowed by Lawrence J. and Mr. Gathorne Hardy, Sir James Woodhouse dissenting, in *National Telephone Co.* v.

(1) [1894] A. C. 456.
(2) [1894] 2 Q. B. 189; [1894] A. C. 489.
(3) [1905] 1 K. B. 316, 322, 323.
(4) (1904) 68 J. P. 576.

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Postmaster-General. (1) It is not a wasting expense, and therefore is not subject to depreciation. The question is really one of fact in each case, and the arbitrator has allowed it, and this Court will not interfere.

Tyldesley Jones K.C. and *T. Eastham* for the respondents. The present cost, not the original cost, of constructing the tramway is the relevant matter for the arbitrator to consider. The expense of altering Guide Bridge is not part of the expense of constructing the tramway. The railway company may require the bridge to be altered again at some future time. It is a temporary expense, like the breaking up of the road for laying or repairing gas or water pipes: see s. 32, sub-s. 5, of the Tramways Act, 1870. It is not within the principle laid down by the Court of Appeal and House of Lords in the *Edinburgh* (2) and *London* (3) *Tramways Cases* upon which the "then value" of the tramway ought to be assessed. In a later decision in *London Tramways Co.* v. *London County Council* (4) the House of Lords held that they could not interfere with their earlier decisions.

As to the item for engineering—that is, the fees paid to the engineer for laying out the tramway and superintending its construction—the depreciation was properly allowed.

As to interest on capital during construction, as part of the capital was spent on wasting assets—e.g., rails—it should be depreciated with the capital.

[*Stockton Water Board* v. *Kirkleatham Local Board* (5) was referred to.]

As to cost of raising capital, it is no part of the cost of constructing the tramway. It is not an element in the value of the tramway. The tramway cannot have any added value to a purchaser because the original constructor had to raise money on credit to construct it. The amount would depend on the financial standing of the promoters. Such an expense was never allowed until the *Telephone Case.* (1) The judgment of Sir James Woodhouse on this

(1) 29 Times L. R. 190. The shorthand note of the judgment was produced in Court.

(2) [1894] A. C. 456.

(3) [1894] 2 Q. B. 189; [1894] A. C. 489.

(4) [1898] A. C. 375.

(5) [1893] A. C. 444.

point ought to be followed in preference to that of Lawrence J. and Mr. Gathorne Hardy. If however it is allowable, it is subject to depreciation in the same way as interest on capital.

Hon. E. E. Charteris K.C. in reply.

Cur. adv. vult.

March 22. BANKES L.J. read the following judgment: This appeal raises questions as to the amount to which the appellants are entitled upon the taking over of their undertaking by the respondents. The basis upon which the value of the appellants' property has to be assessed was settled by the decision of the House of Lords in the *Edinburgh Tramways Co.* v. *Lord Provost, &c., of Edinburgh.* (1) The effect of that decision, so far as it is material to the present case, is, I think, correctly summarised in the headnote where it says "the 'then value of the tramway'" (quoting the language of s. 43 of the Tramways Act, 1870) "must be measured by what it would cost, at the date of the sale, to construct the lines, subject to a deduction for depreciation, and that rental value must not be taken into consideration." An arbitrator was appointed to assess the value of the appellants' undertaking. He made an award subject to a special case. In arriving at the amount awarded he uses language in para. 11 of his award which indicates that he has followed the directions of s. 43 of the Tramways Act, 1870, and the decision in the *Edinburgh Tramways Case.* (1) At the request of the purchasing authorities he stated a special case in reference to certain items of the appellants' claim. It is in respect of four of these items that this appeal is made.

The first related to an allowance for engineering. The respondents contended that this item should be depreciated; the appellants contended that it should not. The arbitrator finds in para. 16 (1.) of the case that he ought to depreciate the allowance. He says: "I ought to depreciate the said allowance for engineering on the ground that such allowance should be treated in the same way as any other item in respect

(1) [1894] A. C. 456.

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of the structure of the purchased undertaking which did not represent expenditure made once for the whole life of the undertaking." Rowlatt J. thinks that he was entitled to deal with the matter in that way, and I agree with him. I do not see how any question of law arises upon the point in the absence of any information as to what the sum allowed actually represented. The experienced arbitrator has said that the amount which he has allowed did not represent expenditure made once for the whole life of the undertaking, and I fail to see how any Court can interfere with this finding.

The second item related to the cost of raising capital. The arbitrator allowed this. Rowlatt J. has disallowed it upon the ground that the raising of capital is antecedent to the history of the case. I doubt whether, in the ordinary order of events in such a case as the present, the raising of capital precedes the parliamentary expenses, or the engineers' fees, both of which have been allowed, but that is not the question; the question, and the only question here, must be whether, upon the case as stated, the arbitrator was wrong in law in allowing this item. For this purpose it is necessary to look somewhat closely into the case to see what the suggested point of law is. The respondents objected to any allowance of this item upon three grounds, which are set out in para. 14 (2.) (D), clauses (*a*), (*b*) and (*d*). [The Lord Justice read the clauses.] The appellants' contention is set out in para. 15 (2.) of the case. [The Lord Justice read it.] The arbitrator deals with these rival contentions in para. 16 (4.). [The Lord Justice read it.] I read the first part of his finding as negativing the contention that the expenditure related to the commercial undertaking, and not to the tramway, in which view, if it is a question of law, I agree with him. I read the second part of his finding as negativing the suggestion that he was to take into consideration the case of any particular purchaser, in which view I also agree with him. I do not think that this special case raises the question in its widest form, which was discussed in *National Telephone Co.* v. *Postmaster-General* (1), to which we were referred. In

(1) 29 Times L. R. 190.

my opinion it is not possible to interfere with the arbitrator's finding on this point.

The next point had reference to an expenditure incurred in connection with a temporary shifting of the tramway line during some alterations to a railway bridge. The line as it existed on May 1, 1918, was the line in its original position after it had been restored to that position. I do not think that there was any evidence upon which the arbitrator could find that the cost of shifting the line and restoring it again to its original position formed part of the cost of construction of the purchased undertaking as it existed on that day. I further think that the fact that the expenditure was incurred in pursuance of the obligations created by the Order is immaterial. Upon these grounds I agree with the view expressed by Rowlatt J. on this point.

The last point has reference to interest upon capital during construction. Upon this point also I agree with Rowlatt J.'s view that the interest must follow the capital, and that a further inquiry is therefore necessary.

As the other members of the Court think that the appeal must be dismissed with costs, that will be the order of the Court.

SCRUTTON L.J. read the following judgment: The Tramways Act of 1870, by s. 43, gave local authorities, after a tramway in their streets had been constructed by a private promoter for twenty-one years, the power of purchasing "the undertaking" "upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking." Under this power certain local authorities at Ashton-under-Lyne have purchased the tramway of the Oldham, Ashton and Hyde Electric Tramways, Ld., and the questions before the Court arise on a special case stated by the arbitrator who is ascertaining "the then value" as above defined.

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The Court would be in great difficulty but for the decision of the House of Lords in the *Edinburgh* and *London Tramways Cases*. (1) In those cases the tramway companies contended that the then value should be ascertained by the rental that a person hiring the undertaking would give for it as a going concern. The arbitrators in those cases had rejected the criterion of rental value, and had proceeded on the principles stated by Lord Watson (2): "The referees have dealt with 'the tramway' as a subject belonging to the second of these classes; and they have accordingly put upon it what may conveniently be termed a construction value. The rule which he followed is thus stated by Mr. Tennant, 'that the proper value of the said tramways to be determined by me, according to my construction of the statute, is such sum as it would cost to construct and establish the same, under deduction of a proper sum in respect of depreciation to their present condition, and that, in estimating such cost, I am entitled to take into account the fact that said tramways are now successfully constructed and in complete working condition.' Sir Frederick Bramwell came to practically the same conclusion. He declined to give any effect to evidence led by the company for the purpose of showing 'the rental value of the purchased tramways considered as let or capable of being let,' whilst he received, and took into account, evidence adduced on behalf of the County Council tending to show 'the proper cost of construction of the purchased tramways, and the depreciation of such value, by comparing the condition at the time of sale and purchase with the condition when newly constructed.'" The arguments and the judgments of the Court are directed to the broad difference between the then cost of construction less depreciation, and the then rental value, and do not, except in one matter, throw any light on how the then cost of construction less depreciation should be worked out in detail.

Four matters of detail were brought before us by the present appeal, two relating to the then cost of construction,

(1) [1894] A. C. 456, 489. (2) [1894] A. C. 469, 470.

two relating to the allowance for depreciation. Of those items relating to cost of construction I take first the item relating to Guide Bridge. The special case contains practically no facts in regard to it, and I suppose Rowlatt J. obtained the facts stated in his judgment from an agreement of counsel. It appears that the tramway as originally constructed crossed certain railway bridges. The railway companies, to whom these bridges belonged, obtained a protective clause (s. 8, sub-s. 4, of the Oldham Order), whereby if the railway company desired (inter alia) to "lengthen" their bridge the tramway company were at their own expense temporarily to divert their tramway till the lengthening was completed. The railway company did, at their own expense, lengthen Guide Bridge, and the tramway company did, at their own expense, temporarily divert their tramway. When the bridge was lengthened the tramway went back to its old site. The tramway company now claim the cost of the temporary diversion. This would obviously not be part of the cost of constructing at the time of purchase a tramway on the road as then existing. The reason why it is claimed is that in the *Edinburgh Case* (1) it appeared that the tramway company had originally at their own expense widened the North Bridge to allow a double line of tramways to be laid on it. They claimed this expense as part of the then cost of construction, the arbitrator allowed it, and Lord Low, the Lord Ordinary, said: "The referee has proceeded upon the footing of giving to the company the value of everything which has cost them money, in so far as the same is available to the corporation, and that appears to me to be what the statute directs." Nothing is reported to have been said on the point in the Inner House or House of Lords. It appears to follow that the "then value," that is, as stated by Lindley L.J. (2), what it would then cost the purchasers to make if they had to make the tramway themselves, would include the cost of making at the time of purchase on the site, as it would be if the tramway company had not spent any money

(1) See 21 R. 688, 695. (2) [1894] 2 Q. B. 206.

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on it. This may be right, though it is getting a good deal of meaning out of "then value," but it does not seem to cover the present case. No part of the site, the Guide Bridge, is paid for by the tramway company, as was the case of the North Bridge. The tramway company had paid the cost of a temporary diversion which no longer exists, or is available. The railway company paid for the bridge. I agree in the view of Rowlatt J., who disallowed the arbitrator's allowance of this claim, that this item cannot, as a matter of law, be allowed in the cost of construction at the present time necessary to obtain the "then value" of the tramway.

The second point was whether there could be included in the cost of construction the cost of raising capital. The arbitrator finds in para. 16, clause 4. [The Lord Justice read the clause.] This appears to be a finding that any one in good credit who had to raise money by borrowing to construct a tramway would expend a certain sum, and that this should be included in cost of construction at the time of purchase. This is the point on which in the telephone arbitration (1) the Railway Commission differed, Lawrence J. and Mr. Gathorne Hardy thinking the claim was admissible, the late Lord Terrington that it was not. Rowlatt J. adopted the view of Lord Terrington, and held that the claim was, as a matter of law, irrecoverable, being "antecedent to the relevant history of the case," or, in other words, too remote. It seems clear that you are not to consider the actual cost of raising capital to the company. This would make the then value, the then cost of construction, vary with the financial stability of the original constructor. Nor could it depend on the estimated cost to the particular purchaser, so that Rothchilds would pay a less sum than a speculative promoter. The arbitrator assumed a person of good credit who must borrow money. It is true that a man who has no money must borrow money if he wants to construct a work that costs money. But it is equally true that to get a man or company to construct a work, the man must be born, reared and educated, which costs money, and the company must

(1) 29 Times L. R. 190.

be formed and registered, which costs money. The reason why the cost of forming the company, or rearing the man, is not included in the cost of constructing the tramway is that it is too remote, and in my view the same reason excludes the cost of providing money, if that has to be incurred. The cost of a rail, its purchase price, does not, in my opinion, include the cost of finding the money to pay the price; that is too remote from the cost of the rail. On this point also I agree with the view of Rowlatt J.

The other two points arise on the measure of depreciation, if any, to be allowed from the then cost of construction. The then cost of construction gives a new tramway, but the purchaser gets an old tramway with a certain amount of wear, and therefore a reduction should be allowed from the then cost of construction to get the then value. It is said that there are some items of cost of construction which are incurred once and for all, and will never occur again, so that a purchaser does not get any depreciated value but the full value of an expenditure which will not occur again. It appears to me that this is in principle right, and whether any item comes within this class is usually a question of fact. The first item in question is the percentage added to cost of construction for engineering fees. The very experienced arbitrator treated this as an item which should be depreciated, and the judge upheld his view. I think it is a question of fact, with the decision of which this Court cannot interfere.

The second point is depreciation on interest on capital during construction. The arbitrator did not depreciate this item on the ground that in his view it represented expenditure made once and for all. The judge took the view that the interest followed the principal, and that as some of the capital expenditure was admittedly depreciable the interest on it was depreciable also, and he remitted this part of the award to the arbitrator to alter his figure on this basis. I agree with this view. If, as appears, the arbitrator treated all interest on capital during construction as not subject to depreciation, whether the capital itself was subject to

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depreciation or not, I think he went wrong in law, and should reconsider his decision.

The appeal, in my view, fails on all points, and should be dismissed with costs.

ATKIN L.J. read the following judgment: The questions that we have to decide in this case arise upon a case stated by an arbitrator. The learned judge has come to a conclusion upon all the points of law raised in the case. We only have to deal with such of the points decided by him as are complained of by the appellants. There is no cross-appeal by the respondents in respect of points decided against them. The appellants are a tramway company, and the respondents are various local authorities, and the parties are sellers and buyers respectively of the tramway under s. 43 of the Tramways Act, 1870. The dispute arises on the determination of the price to be paid by the buyers to the sellers in pursuance of the section. The principles of valuation have been laid down by the House of Lords in the *Edinburgh Tramways Case* (1) in 1894. They are not disputed by the parties, and have been adopted by the arbitrator in his award in these terms, para. 11: "The value of the purchased undertaking measured by what it would cost to construct and establish the purchased undertaking on May 1, 1918, if such purchased undertaking had not existed at that date, but taking into account a proper deduction in respect of depreciation." As to this statement, the arbitrator was not asked to state a case; and it is agreed that it is this principle that we have to apply in determining the point in issue.

The first item is for engineering fees. The arbitrator allowed engineering fees, subject to a reasonable depreciation. The learned judge affirmed the arbitrator. The sellers complain of depreciation being allowed. The method adopted by the arbitrator is to investigate the various items of cost of the tramway, the structure purchased, to consider their age and prospective life at the fixed date, which I will call the valuation date, and to make the necessary allowances from original cost in respect of the proportion of age to life.

(1) [1894] A. C. 456.

In some cases he has considered that the items are in respect of cost incurred once and for all, which I understand to mean items the life of which is, for the purposes of the buyer, perpetual, and which will never require renewing. Amongst such items is included, apparently with the consent of both parties, the cost of excavation. The arbitrator has also included preliminary expenses of the formation of the selling company without depreciation, and the judge has affirmed this item, and there is no appeal. In the particular case of engineering fees, the arbitrator has depreciated it upon the ground that it did not represent expenditure made once for the whole life of the undertaking. Taking his principle, I think it impossible to quarrel with his decision, which, on this point, appears to me to be one of fact only. Speaking for myself, I have great difficulty in seeing how, in the cost of a structure such as a tramway, there can be any items which do not admit of any depreciation. It cannot be supposed to last for ever, and as its value must diminish in a proportion bearing some relation to its age, I should have thought that if one bases value on cost every item of cost must undergo some diminution in value. Excavation is only of value in so far as it serves in constructing the tramway. If the structure eventually dies the excavation will be of no value, and may represent a liability. It is however sufficient to say that in any view of depreciation the decision in this respect cannot be interfered with.

Cost of raising capital. This is allowed by the arbitrator on the ground that it is part of the necessary cost of construction, as it represented expenditure which would have to be incurred by any one in good credit undertaking such construction. It has been disallowed by the judge on the ground that it is no part of the cost of construction, but is an expense independent of such cost. We have had the advantage of reading the verbatim report of the decisions of Lawrence J. and the late Lord Terrington in the *Telephone Case.* (1) They put the respective views as clearly and forcibly as they can be put, and assisted by their complete

(1) 29 Times L. R. 190.

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survey of the question I have come to the conclusion that Rowlatt J. was right in disallowing the item. The principle laid down in the Tramways Act as interpreted by the House of Lords (1) is that the purchase price is to be present cost of replacement with an allowance for age. From this point of view the buyer in considering value has to consider which will be worth more to him, to build a new tramway himself, or to buy an old one. If this is calculated on a money basis, the cost of raising capital, even if constant, comes into both sums, and if it is to be taken into account in the price in the second alternative it comes in twice over. For instance, in the present case the arbitrator has fixed this item as 5500*l.* without depreciation. If the sellers' tramway was quite recently constructed, say within six months of the valuation date, so that depreciation might be ignored, the buyers would find themselves paying 5500*l.* for the sellers' cost of raising capital, and 5500*l.* for their own cost of raising the capital to pay the sellers their price. The formula requires adherence to present cost of construction, and has no reference to expenditure for other purposes. The present item, which must vary infinitely with the credit and resources of the particular constructor, seems to me incapable of being averaged for a hypothetical constructor, and in any case is too far removed from cost of construction in any business sense to admit of being included in the calculation. I am inclined to think that this view might exclude preliminary expenses, which have been allowed without an appeal. This consideration has caused me some doubt, but whatever the logical consequences may be, I have come to a definite conclusion as stated.

Interest on capital during construction. This has been allowed by the arbitrator without depreciation. The judge also allowed it, but has taken the view that depreciation will follow the purposes of the capital expenditure on which the interest is allowed, and has remitted the matter for depreciation to be adjusted accordingly. I agree with this view, and have nothing to add to the learned judge's judgment.

(1) [1894] A. C. 456, 489.

Expenses incurred in respect of Guide Bridge. These were expenses incurred by the sellers in 1906, about eight to ten years after the tramway was constructed. The expenditure was imposed upon the sellers by s. 8, sub-s. 4, of their Tramways Order, which provided that if, and whenever necessary, the named railway companies desired to make certain structural alterations to the bridges carrying any road over the railway the tramway company should, at their own expense, temporarily divert or remove the tramway. Apparently in 1906 one of the railway companies required the bridge in question to be altered, so that the railway line might be widened, and the expenses here claimed are the expenses incurred by the sellers in complying with the section. It appears to me that this has nothing to do with the hypothetical cost of construction at the valuation date. That cost will be considered, and no doubt has been considered, as though the tramway were constructed over the lengthened bridge. The cost actually incurred by the sellers while carrying on their statutory undertaking in complying with their statutory obligations seems to me to be quite irrelevant, and was rightly disallowed by the judge. It is quite different from the case suggested in argument where the Order imposes upon the tramway company, as part of the conditions of allowing the undertaking, that structural alterations, such as construction or widening of bridges or streets, be made by the company at their cost. In such a case, inasmuch as the value is to be the cost of construction at the valuation date as if the undertaking had not existed at that date, the cost of such alterations might reasonably be imputed to the hypothetical constructor. The present claim seems to me essentially different.

For these reasons I agree that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for appellants: *Sydney Morse.*

Solicitors for respondents: *Lees & Co., for F. W. Bromley, Ashton-under-Lyne; Thomas Brownson, Hyde; William Richards, Denton; Frederick Hamer, Ashton-under-Lyne.*

W. F. B.

Distinguished. BOGUSLAWSKI *v.* GDYNIA-AMERYKA LINIE [1950] 1 K. B. 157

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April 29; *May* 2, 12.

[IN THE COURT OF APPEAL.]

AKSIONAIRNOYE OBSCHESTVO DLIA MECHANICHESKOYI OBRABOTKY DIEREVA (1) A. M. LUTHER (COMPANY FOR MECHANICAL WOODWORKING A. M. LUTHER) *v.* JAMES SAGOR AND COMPANY.

[1920. A. 1861.]

International Law—Recognition of Foreign Government—Russian Soviet Republic—Confiscatory Act—Sale of confiscated Goods—Validity of Sale.

The Courts of this country will not inquire into the validity of the acts of a foreign government which has been recognized by the Government of this country. In this respect it is all one whether the foreign government has been recognized as a government de jure or de facto.

The Russian Socialist Federal Soviet Republic passed a decree in June, 1918, declaring all mechanical sawmills of a certain capital value and all woodworking establishments belonging to private or limited companies to be the property of the Republic. In 1919 agents of the Republic seized the plaintiffs' mill or factory in Russia and the stock of manufactured wood therein. In August, 1920, agents of the Republic purported to sell a quantity of the stock so seized to the defendants, who imported it into England.

In letters dated in April, 1921, the Secretary of State for Foreign Affairs stated that His Majesty's Government recognized the Soviet Government as the de facto Government of Russia; that a government known as the Provisional Government came into power in March, 1917, and was recognized by His Majesty's Government, and remained in session until December 13, 1917, and was then dispersed by the Soviet authorities.

In an action by the plaintiffs for a declaration that they were entitled to the wood above mentioned:—

Held, that the Government of this country had recognized the Soviet Government as the de facto Government of Russia existing at a date before the decree of June, 1918; that therefore the validity of that decree and the sale of the wood to the defendants could not be impugned, and that the defendants were therefore entitled to judgment.

Judgment of Roche J. [1921] 1 K. B. 456 reversed on further facts.

APPEAL from the judgment of Roche J. (2) in an action tried before the learned judge without a jury.

The plaintiffs were a company incorporated in 1898 in the Empire of Russia according to the laws of Russia. Their

(1) [*Sic* in the record; the transliteration is not quite correct or consistent.—F. P.]

(2) [1921] 1 K. B. 456.

head office was at Reval, where they had a factory for the manufacture of veneer or plywood. They also had a factory or mill at Staraja Russa, about 140 miles south of Petrograd, and there in the year 1919 they had a large stock, not less than 1500 cubic metres, of manufactured boards stamped with the name "Venesta" or the letters "V. L.," the name or trade mark of Venesta, Ld., a British company.

On June 20, 1918, a confiscatory decree purporting to issue from the Government of Russia was passed. The following translation was accepted by the parties in the Court below as giving the meaning of the material portions of the decree.

"Decree of Council of Commissars for the People of June 20, 1918, which appeared in 'Izviestia' in Moscow on June 30, 1918. No. 134.

"By Article 1: All industrial and commercial establishments mentioned below with their capital and assets of whatever nature are declared the property of the Russian Socialist Federative Republic (inter alia);

"(17) All the mechanical saw mills of limited or private companies which have a capital of at least 1,000,000 roubles;

"(18) All woodworking establishments equipped with machinery which belonged to private or limited companies.

"Decree signed by Lenin in presence of Council of Commissars and by Commissars of the People;

"TSIRIOUP NAGUINE RIKOF,
"Business Director.
"BOVITCH-BROVENITSCH,
"Secretary of the Council."

In January, 1919, certain Commissaries or officials armed with authority from the Soviet Government took possession of the plaintiffs' factory or mill at Staraja Russa and of the manufactured goods lying there.

On August 14, 1920, a contract was made in London between L. B. Krassin, the representative of the Russian Commercial Delegation in London, and the defendants whereby Krassin on behalf of the Russian Commercial Delegation

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sold to the defendants, a firm carrying on business in London, a quantity of birch, alder, and aspen plywood including the 1500 cubic metres of plywood seized by the Commissaries as above stated. The contract was signed on behalf of the Russian Commercial Delegation by "Commissary to Foreign Trade, Krassin; Secretary, Klishko." It was under the seal of the Agents of the Soviets of the People's Commissaries.

Under this contract the defendants obtained possession of the 1500 cubic metres of plywood boards and imported them into England.

The plaintiffs claimed a declaration that these goods were their property; an injunction restraining the defendants their servants and agents from selling, pledging, or in any way dealing with them; and damages for conversion and detention of them.

The defendants contended that the decree of June 20, 1918, and the subsequent seizure of the goods and sale of them to the defendants were the acts of the Russian Socialist Federal Soviet Republic, a sovereign state, and were valid and effectual to deprive the plaintiffs of the property in the goods and to transfer the same to the defendants.

The following letters relating to the position of L. B. Krassin, the Russian Commercial Delegation, and the Russian Socialist Federal Soviet Republic were received in evidence before Roche J.:—

(1.) A letter dated July 28, 1920, written on behalf of His Majesty's Secretary of State for Foreign Affairs to the solicitors for L. B. Krassin. It stated that Krassin was the authorized representative of the Soviet Government and had been received by His Majesty's Government for the purpose of carrying out certain negotiations. It further stated that His Majesty's Secretary of State regarded Krassin as a foreign representative and as one who in view of the negotiations should be exempt from the process of the Courts.

(2.) A letter of October 5, 1920, written on behalf of His Majesty's Secretary of State for Foreign Affairs to the defendants' solicitors which stated that: "His Majesty's

Government assent to the claim of the Delegation to represent in this country a State Government of Russia."

(3.) A letter dated November 27, 1920, written on behalf of His Majesty's Secretary of State for Foreign Affairs to the plaintiffs' solicitors which stated that "for a certain limited purpose His Majesty's Government has regarded Monsieur Krassin as exempt from the process of the Courts, and also for the like limited purpose His Majesty's Government has assented to the claim that that which Monsieur Krassin represents in this country is a State Government of Russia, but that beyond these propositions the Foreign Office has not gone, nor moreover do these expressions of opinion purport to decide difficult and, it may be, very special questions of law, upon which it may become necessary for the Courts to pronounce. I am to add that His Majesty's Government have never officially recognized the Soviet Government in any way."

The defendants also contended that, by a treaty of peace concluded on February 2, 1920, between the Republic of Esthonia and the Russian Soviet Republic, Reval was recognized as within Esthonian territory and Staraja Russa as within the territory of the Russian Soviet Republic; that consequently the plaintiffs, whose head office was in Reval, had become an Esthonian company; that they as Esthonian citizens were making a claim to property situate in Russia; that under art. XIV. of the treaty mixed Russo-Esthonian Commissions had been established for deciding all such claims; and that any claim of the plaintiffs to property which at the date of the treaty was at Staraja Russa must be made through the mixed commissions and not otherwise.

Roche J. upon the evidence before him found that His Majesty's Government had not recognized the Russian Soviet Government as the government of a sovereign state or power. He also found that the plaintiffs had not become an Esthonian company but had elected to remain a Russian company, which the treaty of February 2, 1920, enabled them to do. He therefore gave judgment for the plaintiffs.

The defendants appealed.

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After the date of the judgment further information was obtained from the Foreign Office touching the status of the Soviet Government of Russia. The appellants applied for and obtained leave to bring this further information before the Court. It was conveyed in the following letters :—

On April 12, 1921, the appellants' solicitors wrote to the Under-Secretary of State for Foreign Affairs asking for a certificate for production to the Court of Appeal that the Government of the Russian Socialist Federal Soviet Republic had been recognized by His Majesty's Government as the de facto Government of Russia.

In answer to this request they received a letter dated April 20, 1921, in these terms : "(1.) I am directed by Earl Curzon of Kedleston to refer to your letter of April 12, asking for information as to the relations between His Majesty's Government and the Soviet Government of Russia.

"(2.) I am to inform you that His Majesty's Government recognize the Soviet Government as the de facto Government of Russia."

In answer to a request for information concerning the Provisional Government, its duration and status, a letter was written from the Foreign Office on April 22 stating that on the termination of the Imperial Government on March 14, 1917, the Provisional Government came into power and was recognized by His Majesty's Government as the then existing Government of Russia, that it remained in power until December 13, 1917, and was then dispersed by the Soviet authorities.

On March 16, 1921, a trade agreement was executed between His Majesty's Government and the Government of the Russian Socialist Federal Soviet Republic. It was signed at London by Sir R. S. Horne on behalf of His Majesty's Government and by L. Krassin on behalf of the Russian Soviet Government. By clause 10 of this agreement the Russian Soviet Government undertook "to make no claim to dispose in any way of the funds or other property of the late Imperial and Provisional Russian Governments in the United

Kingdom." His Majesty's Government gave a corresponding undertaking as regards British Government funds and property in Russia.

Leslie Scott K.C. and *H. L. Murphy* for the appellants. The letters of April 20 and April 22, 1921, from the Foreign Office make it clear (1.) that on April 20 the Soviet Government was recognized by His Majesty's Government as the de facto Government of Russia; (2.) that it succeeded the Provisional Government which came into power on March 14, 1917, first under Prince Lvov and then under M. Kerensky, and lasted until December, 1917; (3.) that the Provisional Government while in existence was recognized by His Majesty's Government. The recognition of a government involves the recognition of its acts from the commencement of its existence: *Williams* v. *Bruffy* (1); *Underhill* v. *Hernandez* (2); *Oetjen* v. *Central Leather Co.* (3) It is plain that the Soviet Government commenced its existence in December, 1917. Acts done by that Government since December, 1917, will not be questioned by His Majesty's Courts of Justice, because the acts of a recognized government are not the subject of adjudication in the Courts of the recognizing government: *Underhill* v. *Hernandez* (4); and the Courts of one country will not sit in judgment on the acts of the government of another done within its own territory: *Underhill* v. *Hernandez* (5); *Oetjen* v. *Central Leather Co.* (6) It follows that the decree of June 20, 1918, the seizure of the respondents' goods in January, 1919, and the sale on August 14, 1920, by L. B. Krassin on behalf of the Russian Commercial Delegation, which was recognized as representing a State Government of Russia by His Majesty's Government, as appears from the letter of October 5, 1920, were acts the validity of which must be taken for granted.

Secondly, the claim of the respondents is a matter to be settled between the Russian and Esthonian Governments

(1) (1877) 96 U. S. 176.
(2) (1897) 168 U. S. 250.
(3) (1917) 246 U. S. 297.
(4) 168 U. S. 250, 254.
(5) 168 U. S. 252.
(6) 246 U. S. 303.

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under the treaty of peace of February 2, 1920. Roche J. decided against the appellants on this point on the ground that the respondents were in truth a Russian and not an Esthonian company. That is not a question to be decided by the Courts of this country, but by the mixed commissions set up by the treaty.

Barrington-Ward K.C. and *St. John Field* for the respondents. The recognition of a foreign government may or may not have a retrospective operation. If the government is recognized as the government de jure the recognition is retrospective and the acts of that government from the beginning of its existence must be recognized as valid acts by the Courts of the sovereign recognizing the foreign government. But if the foreign government is merely recognized as the government de facto the recognition has no retrospective operation. The acts complained of were all done before the Russian Soviet Republic was recognized. It is clear from the letter from the Foreign Office of November 27, 1920, that the Soviet Republic was not recognized until after that date. The alleged sale to the respondents took place in the preceding August. Assuming therefore that the Russian Commercial Delegation, which is supposed to have effected the sale, is the Russian Soviet Republic subsequently recognized, which is by no means clear, the acts of the Delegation were never recognized by His Majesty's Government.

Secondly, the Courts of this country are not bound to accept as valid all acts of what nature or kind soever done by a recognized foreign government: *Folliott* v. *Ogden* (1), affirmed in *Ogden* v. *Folliott* (2); *Wolff* v. *Oxholm* (3); *Republic of Peru* v. *Dreyfus* (4); *Lecouturier* v. *Rey.* (5) If the act is contrary to the morality or political institutions of this country His Majesty's Courts of Justice may treat it as null and void: *Simpson* v. *Fogo* (6); *Kaufman* v. *Gerson* (7); Dicey on Conflict of Laws. (8) The decree of

(1) (1789) 1 H. Bl. 123.
(2) (1790) 3 T. R. 726.
(3) (1817) 6 M. & S. 92.
(4) (1888) 38 Ch. D. 348.
(5) [1910] A. C. 262.
(6) (1862) 1 H. & M. 195.
(7) [1904] 1 K. B. 591.
(8) 2nd ed. (1908), p. 36.

June 20, 1918, is not an act to command respect by any innate justice or morality. It is contrary to English political principles and ought to be disregarded. The alleged sale by L. B. Krassin should meet with the same fate. There is then nothing to bar the respondents' claim.

Leslie Scott K.C. in reply. There is no difference in effect between recognition of a government as a government de jure and recognition of a government as a government de facto. In either case the recognition validates acts done by the government from the time when it can be ascertained as the government which is subsequently recognized. After it has been recognized its acts cannot be questioned in a Court of law. It may be a question for private speculation whether the decree of June 20, 1918, was a wise or an improvident one, a barbarous or a civilized institution. "But here we must take it as the law of an independent country, and the laws of every country must be equally regarded in Courts of justice here, whether in private speculation they are wise or foolish" : *Wright* v. *Nutt.* (1)

May 12. The following written judgments were delivered :—

BANKES L.J. The action was brought to establish the plaintiff company's right to a quantity of veneer or plywood which had been imported by the defendants from Russia. The plaintiffs' case was that they are a Russian company having a factory or mill at Staraja Russa in Russia for the manufacture of veneer or plywood, and that in the year 1919 the so-called Republican Government of Russia without any right or title to do so seized all the stock at their mill and subsequently purported to sell the quantity in dispute in this action to the defendants. The plaintiffs contended that the so-called Republican Government had no existence as a government, that it had never been recognized by His Majesty's Government, and that the seizure of their goods was pure robbery. As an alternative they contended that the decree of the so-called government nationalizing all factories, as a result of which their goods were seized,

(1) (1789) 1 H. Bl. 136, 149.

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is not a decree which the Courts of this country would recognize.

The answer of the defendants was two-fold. In the first place they contended that the Republican Government which had passed the decree nationalizing all factories was the de facto Government of Russia at the time, and had been recognized by His Majesty's Government as such, and that the decree was one to which the Courts of this country could not refuse recognition. Secondly they contended that the plaintiff company was an Esthonian and not a Russian company, and that as a result of the provisions of the treaty of peace between Russia and Esthonia the plaintiffs' complaint must be dealt with by a commission set up in pursuance of art. XIV. of that treaty. Roche J. decided the two main points in the plaintiffs' favour. Upon the evidence which was before the learned judge I think that his decision was quite right. As the case was presented in the Court below the appellants relied on certain letters from the Foreign Office as establishing that His Majesty's Government had recognized the Soviet Government as the de facto Government of Russia. The principal letters are referred to by the learned judge in his judgment. He took the view that the letters relied on did not establish the appellants' contention. In this view I entirely agree.

In this Court the appellants asked leave to adduce further evidence, and as the respondents raised no objection, the evidence was given. It consisted of two letters from the Foreign Office dated respectively April 20 and 22, 1921. The first is in reply to a letter dated April 12, which the appellants' solicitors wrote to the Under Secretary of State for Foreign Affairs, asking for a "Certificate for production to the Court of Appeal that the Government of the Russian Socialist Federal Soviet Republic is recognized by His Majesty's Government as the de facto Government of Russia." To this request a reply was received dated April 20, 1921, in these terms: "I am directed by Earl Curzon of Kedleston to refer to your letter of April 12, asking for information as to the relations between His Majesty's Government and

the Soviet Government of Russia. (2.) I am to inform you that His Majesty's Government recognize the Soviet Government as the de facto Government of Russia." The letter of April 22 is in reply to a request for information whether His Majesty's Government recognized the Provisional Government of Russia, and as to the period of its duration, and the extent of its jurisdiction. The answer contains (inter alia) the statement that the Provisional Government came into power on March 14, 1917, that it was recognized by His Majesty's Government as the then existing Government of Russia, and that the Constituent Assembly remained in session until December 13, 1917, when it was dispersed by the Soviet authorities. The statement contained in the letter of April 20 is accepted by the respondents' counsel as the proper and sufficient proof of the recognition of the Soviet Government as the de facto Government of Russia.

Under these circumstances the whole aspect of the case is changed, and it becomes necessary to consider matters which were not material in the Court below. The first is a question of law of very considerable importance—namely, what is the effect of the recognition by His Majesty's Government in April, 1921, of the Soviet Government as the de facto Government of Russia upon the past acts of that Government, and how far back, if at all, does that recognition extend. The second is a question of fact, whether sufficient evidence was given to establish the identity of the Soviet Government now recognized by His Majesty's Government with the Government which seized and confiscated and sold the appellants' goods.

On the first point counsel have been unable to refer the Court to any English authority. Attention has been called to three cases decided in the Supreme Court of the United States: *Williams* v. *Bruffy* (1); *Underhill* v. *Hernandez* (2); and *Oetjen* v. *Central Leather Co.* (3) In none of these cases is any distinction attempted to be drawn in argument between the effect of a recognition of a government as a de facto

(1) 96 U. S. 176. (2) 168 U. S. 250.

(3) 246 U. S. 297.

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government and a recognition of a government as a government de jure, nor is any decision given upon that point; nor, except incidentally, is any mention made as to the effect of the recognition of a government upon its past acts. The mention occurs in two passages, one in the judgment of Field J. in *Williams* v. *Bruffy* (1), where, after discussing the essential differences between the Government of the Confederate States and the two kinds of de facto governments which he says may exist, he explains that the second of the two kinds exists where a portion of the inhabitants of a country have separated themselves from the parent state and established an independent government. "The validity of its acts," he says, "both against the parent state and its citizens or subjects, depends entirely upon its ultimate success. If it fail to establish itself permanently, all such acts perish with it. If it succeed, and become recognized, its acts from the commencement of its existence are upheld as those of an independent nation." The second mention of the point occurs in the judgment of Fuller C.J. in *Underhill* v. *Hernandez*.(2) He says, in speaking of civil wars: "If the party seeking to dislodge the existing government succeeds, and the independence of the government it has set up is recognized, then the acts of such government from the commencement of its existence are regarded as those of an independent nation." These are weighty expressions of opinion on a question of international law. Neither learned judge cites any authority for his proposition. Each appears to treat the matter as one resting on principle. On principle the views put forward by these learned judges appear to me to be sound, though there may be cases in which the Courts of a country whose government has recognized the government of some other country as the de facto government of that country may have to consider at what stage in its development the government so recognized can, to use the language to which I have already referred of those learned judges, be said to have "commenced its existence." No difficulty of that kind arises in the present case, because, upon the construction

(1) 96 U. S. 186. (2) 168 U. S. 253.

which I place upon the communication of the Foreign Office to which I have referred, this Court must treat the Soviet Government, which the Government of this country has now recognized as the de facto Government of Russia, as having commenced its existence at a date anterior to any date material to the dispute between the parties to this appeal.

An attempt was made by the respondents' counsel to draw a distinction between the effect of a recognition of a government as a de facto government and the effect of a recognition of a government as a government de jure, and to say that the latter form of recognition might relate back to acts of state of a date earlier than the date of recognition, whereas the former could not. Wheaton quoting from Mountague Bernard states the distinction between a de jure and a de facto government thus (1): "A de jure government is one which, in the opinion of the person using the phrase, ought to possess the powers of sovereignty, though at the time it may be deprived of them. A de facto government is one which is really in possession of them, although the possession may be wrongful or precarious." For some purposes no doubt a distinction can be drawn between the effect of the recognition by a sovereign state of the one form of government or of the other, but for the present purpose in my opinion no distinction can be drawn. The Government of this country having, to use the language just quoted, recognized the Soviet Government as the Government really in possession of the powers of sovereignty in Russia, the acts of that Government must be treated by the Courts of this country with all the respect due to the acts of a duly recognized foreign sovereign state.

It becomes material now to consider whether the appellants have given sufficient evidence to establish that the confiscation and subsequent sale of the respondents' property were the acts of the Government which His Majesty's Government have now recognized as the de facto Government of Russia. In my opinion they have. The decree of confiscation as set out in the judgment of Roche J. as reported

(1) International Law, 5th English edition (1916), p. 36.

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in the Law Reports (1) purports to be "A decree of Council of Commissars for the People." The contract of sale of the goods to the appellants dated August 14, 1920, purports to be made by L. B. Krassin on behalf of the Russian Commercial Delegation. The trade agreement between this country and Russia of March 16, 1921, is made between His Majesty's Government and the Government of the Russian Socialist Federal Soviet Republic, thereinafter referred to as the Russian Soviet Government, and is signed by M. Krassin as the representative of that Government. From the letter from the Foreign Office addressed to Messrs. Linklater of April 22, 1921, it appears that the Soviet authorities dispersed the then Constituent Assembly on December 13, 1917, from which date I think it must be accepted that the Soviet Government assumed the position of the sovereign Government and purported to act as such. The witness Rastorgoueff explained that the Council of Commissars for the People is the executive body of the Soviet Republic. The witness Schotter deposed to the seizure of the plaintiffs' goods at the factory being made by persons holding official documents from the Soviet Government, and to the fact that at that time and up to the date of the trial the power (as he expressed it) was in the hands of the Bolshevists. The witness Muller who described himself as confidential clerk to the Russian Trade Delegation of the Russian Socialist Federal Soviet Republic, of which M. Krassin was the head, deposed to the fact that since the end of 1917 the Russian Socialist Federal Soviet Republic had in fact been ruling over that part of Russia in which the plaintiffs' factory at Staraja Russa is situate. Upon these materials I consider that it is established that the decree of confiscation of June, 1918, the seizure of the plaintiffs' goods in January, 1919, and the subsequent sale of them to the defendants in August, 1920, were all acts of the Soviet Government which has now been recognized by His Majesty's Government as the de facto Government of Russia, and must be accepted by the Courts of this country as such.

(1) [1921] 1 K. B. 470.

It is necessary now to deal with the point made by the respondents, that the decree of confiscation of June, 1918, even if made by the Government which is now recognized by His Majesty's Government as the de facto Government of Russia, is in its nature so immoral, and so contrary to the principles of justice as recognized by this country, that the Courts of this country ought not to pay any attention to it. This is a bold proposition. The question before the Court is not one in which the assistance of the Court is asked to enforce the law of some foreign country to which legitimate objection might be taken, as in *Hope* v. *Hope* (1) and *Kaufman* v. *Gerson*. (2) The question before the Court is as to the title to goods lying in a foreign country which a subject of that country, being the owner of them by the law of that country, has sold under an f.o.b. contract for export to this country. The Court is asked to ignore the law of the foreign country under which the vendor acquired his title, and to lend its assistance to prevent the purchaser dealing with the goods. I do not think that any authority can be produced to support the contention. Authority appears to negative it. In *Santos* v. *Illidge* (3) Blackburn J. says: "Assuming the taking to have been prohibited by a British act, still the taking having been of property locally situated in a foreign country, in a manner lawful according to the laws of that country, I apprehend that the property actually passed by the sale, and vested in the purchasers, though they committed a felony according to our law by taking it. It would be otherwise if the transfer were by a British subject of personal property situated within the British dominions; for, the contract passing the property, being prohibited, would be held void, and so the property would not vest; and it would be questionable how the case would have been, if it had been shown that the vendor was a domiciled British subject, though the property was locally situated in Brazil. But, where, as we must take it to be here, a Brazilian vendor, in Brazil, transferred property locally situated in Brazil,

(1) (1857) 8 D. M. & G. 731. (2) [1904] 1 K. B. 591.
(3) (1860) 8 C. B. (N. S.) 861, 876.

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I apprehend that though the vendees were British subjects the validity of the transfer must on every principle of law depend upon the local law of Brazil, and not upon that of the country of the purchaser. See Story on the Conflict of Laws, c. ix., p. 308 (ed. 1835)." (1) The respondents' position is rendered all the more difficult from the fact that the vendor in the present case is a duly recognized sovereign state whose law conferred the title which is challenged. Even if it was open to the Courts of this country to consider the morality or justice of the decree of June, 1918, I do not see how the Courts could treat this particular decree otherwise than as the expression by the de facto government of a civilized country of a policy which it considered to be in the best interest of that country. It must be quite immaterial for present purposes that the same views are not entertained by the Government of this country, are repudiated by the vast majority of its citizens, and are not recognized by our laws. Taking the view I do of the point I do not consider it necessary to discuss the authorities to which our attention has been called.

The only remaining point is one that does not become material having regard to my view of the evidence now before this Court. In the Court below the appellants contended that the Courts of this country had no jurisdiction to entertain the present dispute because the respondents are really an Esthonian company and not a Russian company, and that by the terms of the treaty of peace the present claim is one which must be adjudicated upon by a commission appointed under the treaty. There is in my opinion no substance in the point. Even if the appellants were right on their facts they fail in my opinion in making out either that the present dispute falls within the language of the treaty or that if it did the language of the treaty ousts the jurisdiction of the Courts of this country. Upon the facts, in my opinion, Roche J. was quite right in deciding that the respondents never ceased to be a Russian company. Although I consider

(1) This edition was published in Edinburgh. The corresponding page in the 8th edition (Boston, 1883) is p. 533.

that upon the materials before him the learned judge's judgment was quite correct, I think that upon the fresh materials before this Court the appeal succeeds and the judgment must be set aside and entered for the appellants. As the respondents succeeded, as I consider, rightly upon the evidence upon which the appellants relied in the Court below, I think that the respondents should have the costs of the action, and the appellants should have the costs of this appeal.

Since writing this judgment a further communication from the Foreign Office dated May 4, 1921, has been supplied by the respondents' solicitors to the members of the Court, and to the appellants' solicitors. The communication was made to a firm of solicitors interested in some other litigation. In the communication the writer states that he is instructed to state that His Majesty's Government recognize the Soviet Government of Russia as the de facto Government of that country as from March 16, 1921. I have ascertained that the words "as from" should be read "as on." So read the communication adds nothing to the information already before the Court and I need not refer to it further.

WARRINGTON L.J. The question in this case is whether the plaintiffs, or the defendants, are to be treated in this country as the owners of certain goods formerly the property of the plaintiffs, but since seized and sold to the defendants by persons purporting to act as the agents of the Russian Soviet Government. Roche J. has given judgment in favour of the plaintiffs' claim, and the defendants appeal. Roche J. founded his judgment on the conclusion of fact arrived at by him on the evidence before him that the Russian Soviet Government had not been recognized by the Government of this country, and therefore the Courts could not recognize it or hold that it had sovereign power, or was able to deprive the plaintiff company of its property. With this finding on the materials before the learned judge I entirely agree. Since the date of the judgment, however, it appears by a letter dated April 20, 1921, written by the Foreign Office

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to the defendants' solicitors that His Majesty's Government recognize the Soviet Government as the de facto Government of Russia, and it appears as the result of the further letters referred to by Bankes L.J. that the recognition took effect on March 16, 1921, the date of the trade agreement between this country and Russia. The case therefore comes before us upon fresh materials of which we are bound to take notice, and which make a radical alteration in the circumstances under which the question is to be decided.

It is quite unnecessary to state the facts in detail, they are sufficiently stated in the judgment of Roche J., and for the present I will assume that the decree of June 20, 1918, declaring the establishments capital and assets of certain companies, including such a company as the plaintiffs, to be the property of the Russian Socialist Federal Republic was a decree of the same government as that which has since been recognized, and that the persons who afterwards seized the goods in question and those who sold them to the defendants were acting as the agents of that government.

The question then is whether the Court has any power to question the validity of the proceedings under which the property in the goods has prima facie been transferred to the defendants. The letter of the Secretary of State is clearly conclusive as to the status of the Soviet Government—namely, that it is an independent sovereign Government: see *Mighell* v. *The Sultan of Johore*, per Lord Esher M.R. (1) It is well settled that the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction cannot be questioned in the Courts of this country: "Every sovereign state is bound to respect the independence of every other sovereign state, and the Courts of one country will not sit in judgment on the acts of the Government of another done within its own territory": per Clarke J. delivering the judgment of the Supreme Court of the United States of America in *Oetjen* v. *Central Leather Co.* (2) The existence of this principle of law is implicit in the speeches of both Lord Macnaghten and Lord Shaw

(1) [1894] 1 Q. B. 149, 158. (2) 268 U. S. 297, 303.

in *Lecouturier* v. *Rey* (1), and is not disputed by counsel for the respondents in the present case.

Some reliance was placed by the respondents upon the principle enunciated in such cases as *Kaufman* v. *Gerson* (2), that the Courts of this country will not enforce a contract invalid by our law as being in contravention of some essential principle of justice or morality, notwithstanding that by the law of the country where it was made no such objection could be raised to it. In my opinion this principle has no application. The appellants are not seeking to enforce such a contract. They are resisting an endeavour on the part of the respondents to induce the Court to ignore and override legislative and executive acts of the Government of Russia and its agents affecting the title to property in that country; it is that which, in my opinion, we are not at liberty to do.

But then it is said that at the time when the legislative or executive acts were done the persons assuming to act as the Government of Russia had not been recognized by this country, and those acts therefore are not entitled to the respect due to the acts of an independent sovereign state. This contention raises the question whether recognition is retroactive to any and what extent. Assuming that the acts in question are those of the government subsequently recognized I should have thought that in principle recognition would be retroactive at any rate to such date as our Government accept as that by which the government in question in fact established its authority. It appears from the letter of the Foreign Office dated April 22, 1921, that that date is anterior to any of the events material to the present case. "Recognition is the act through which it becomes apparent that an old state is ready to deal with a new state as an international person and a member of the family of nations." (3) If this is so then provided the act in question was an act of the state so recognized it must, in my opinion, be entitled to the same respect as the act of a sovereign state, whether done before or after recognition.

(1) [1910] A. C. 262.
(2) [1904] 1 K. B. 591.
(3) Oppenheim, International Law, vol. i., 3rd ed. (1920), p. 135.

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We have not been referred to, nor have I found, any authority in English law on the point, but there are decisions of the Supreme Court of America directly supporting the view I have expressed. The first of those is the judgment of Field J. delivering the opinion of the Supreme Court in *Williams* v. *Bruffy*. (1) Speaking of de facto governments he says: "The latter are of two kinds. One of them is such as exists after it has expelled the regularly constituted authorities from the seats of power and the public offices, and established its own functionaries in their places, so as to represent in fact the sovereignty of the nation. . . . . As far as other nations are concerned, such a government is treated as in most respects possessing rightful authority; its contracts and treaties are usually enforced; its acquisitions are retained; its legislation is in general recognized; and the rights acquired under it are, with few exceptions respected after the restoration of the authorities which were expelled." It is true that there are here no express words affirming the validity of the acts of such a de facto government as from the commencement of its existence, but that such a view is implied is clear; the learned judge is obviously speaking of all the acts of such a government after it has come to represent the sovereignty of the nation. In the case of the other kind of de facto governments—namely, "where a portion of the inhabitants of a country have separated themselves from the parent state and established an independent government," his view is quite plainly expressed. He says: "If it succeed, and become recognized, its acts from the commencement of its existence are upheld as those of an independent nation," and (speaking of the American States after their separation from Great Britain) he says: "Having made good their declaration of independence, everything they did from that date was as valid as if their independence had been at once acknowledged." (2) The same view is expressed in the judgment already referred to in *Oetjen* v. *Central Leather Co.* (3) It is true that in this case

(1) 96 U. S. 176, 185. (2) 96 U. S. 186.
(3) 246 U. S. 297, 302.

the Court is applying the principle to a government recognized as the de jure government, but in my opinion there is no difference for the present purpose between a government recognized as such de jure and one recognized de facto. In the latter case, as well as in the former, the government in question acquires the right to be treated by the recognizing state as an independent sovereign state, and none the less that our Government does not pretend to express any opinion on the legality or otherwise of the means by which its power has been obtained. In fact I rather think a de jure government in international law means "one which, in the opinion of the person using the phrase, ought to possess the powers of sovereignty, though at the time it may be deprived of them"; while a de facto government is one which is "really in possession of them, although the possession may be wrongful or precarious." (1) I express no opinion on the question whether the retroactive effect of recognition is so wide as to cover every act of the recognized government from the commencement of its existence. It is unnecessary to do so in the present case for the reason that our Government clearly treats the Soviet Government as having effectively displaced the previous Government at a date anterior to the earliest of the relevant events. I am of opinion, therefore, that on the assumptions mentioned above the Court is not in a position to question the validity of the acts whereby the property in the goods in question has been taken from the plaintiffs and transferred to the defendants.

I have now to consider whether those assumptions are justified. I think they are. In my opinion it is sufficiently proved that the Council of Commissars by whom the decree of June 20, 1918, purported to have been made were the persons at that time exercising supreme authority in Russia, and that the actual seizure of the goods in question was in pursuance of that decree, and by persons acting under the authority of the Government. The contract for sale to the defendants was made by M. Krassin as the representative of the Commercial Delegation in this country, which was

(1) Wheaton, International Law, 5th English edition (1916), p. 36.

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treated by our Government as representing "A State Government of Russia." (See the letter of October 5, 1920, from the Foreign Office.) Was the Government afterwards recognized the same Government as that by which the several acts above referred to were done? There is no evidence of any change of government in Russia since before June 20, 1918, and in clause 10 of the trade agreement between this country and the Russian Soviet Government the succession of Governments in Russia is described as "The late Imperial and Provisional Russian Governments," and the Russian Soviet Government, and in the letter of April 22, 1921, already referred to, it is stated that it was the Soviet authorities who displaced the Provisional Government. I think, therefore, we are entitled to infer that the Government recognized as the Soviet Government existed before the date of the decree, and has been the Government of Russia ever since.

A further point was taken by the appellants founded on the suggestion that the plaintiff company must, since the recognition of Esthonia as a separate independent state, be treated as an Esthonian subject, and that its rights are regulated exclusively by certain treaty stipulations between Russia and Esthonia. Roche J. decided against the appellants on this point. I am quite content with his judgment in this respect, and desire to add nothing thereto. On the other point, however, I am of opinion that the appeal succeeds, and that judgment ought to have been entered and ought now to be entered for the defendants in the action.

SCRUTTON L.J. This appeal, which raises questions of general importance, relates to the ownership of certain wood goods which came to England from Russia by way of Esthonia. The plaintiffs, a Russian company, claim them as their property because they were made by the company's servants in Russia in 1918, at their factory at Staraja Russa. The defendants, an American firm, claim them under a purchase on August 14, 1920, from one Krassin, claiming to be the representative in England of the Government in Russia,

and selling the goods as the property of that Government. Going a step further, the defendants allege that the goods became the property of that Government by virtue of a Government decree of June 20, 1918, nationalizing all wood factories and their property, followed by a taking possession of the goods by the Government under that decree in January, 1919. Roche J. decided in favour of the plaintiffs, and the defendants appeal.

The plaintiffs' head office before the war was in Reval, then in Russia. One of the defendants' points was that now by the treaty of peace between Russia and Esthonia Reval formed part of Esthonian territory; that the plaintiffs had thus become an Esthonian company, and were therefore confined in their remedies to the method prescribed by that treaty of peace. On this I agree with Roche J. that by their proceedings in evidence before us the company preserved themselves as a Russian company. If they had failed I am not satisfied that the treaty prevented them from protecting their rights of property in foreign countries.

On the more serious question of the position of the Government of Russia, this Court is in a different position from Roche J. In his judgment on December 21, 1920, he stated that he was satisfied that His Majesty's Government had not recognized the Soviet Government as the Government of a Russian Federal Republic or of any sovereign state or power. There were laid before us letters from the Foreign Office, one dated April 20, 1921, stating "that His Majesty's Government recognize the Soviet Government as the de facto Government of Russia"; one dated April 22, 1921, stating that the Provisional Government (the Government of M. Kerensky) was displaced by the All Russian Congress of Workmen's, Soldiers', and Peasants' deputies on November 8, 1917, and the Constituent Assembly dispersed by the Soviet authorities on December 13, 1917; and also a trade agreement made on March 16, 1921, between the Government of the United Kingdom and the Government of the Russian Socialist Federal Soviet Republic, acting by L. Krassin. This gentleman is the person who sold

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the goods to the defendants on behalf of the Russian Commercial Delegation. There was evidence that this delegation was a department of the Russian Socialist Federal Soviet Republic, as was the Soviet of People's Commissaries by whom the decree nationalizing woodworking factories was made.

An appeal to this Court is a rehearing, and it has been frequently decided that the Court must give the judgment which the judge below would have given had any retrospective statute, passed since the date of his judgment, been in force at that date. His Majesty's Government having in 1921 clearly recognized the Soviet Government as the de facto Government of Russia, the questions argued before us were (1.) Whether that recognition extended back to August 14, 1920, when L. B. Krassin sold the goods in question to the defendants, or to June 20, 1918, when the decree nationalizing the factories was passed. This would include the question whether the government de facto on those dates was the same government as was recognized by the British Government in 1921, or a predecessor in title of that government; (2.) whether, assuming that recognition to extend to the dates in question, yet the legislation in question in confiscating private property without compensation was so contrary to British moral and political ideas that the English Courts would decline to recognize it, or to give effect to rights derived from it.

The principle of the immunity of foreign states from the jurisdiction of this country was stated by this Court in the *Parlement Belge* (1): "We are of opinion that the proposition deduced from the earlier cases in an earlier part of this judgment is the correct exposition of the law of nations, viz., that as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its Courts, any of its territorial jurisdiction over the person of any sovereign or ambassador

(1) (1880) 5 P. D. 197, 217.

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could not question the title of the Government of Russia to goods brought by that Government to England, it cannot indirectly question it in the hands of a purchaser from that Government by denying that the Government could confer any good title to the property. This immunity follows from recognition as a sovereign state. Should there be any government which appropriates other people's property without compensation, the remedy appears to be to refuse to recognize it as a sovereign state. Then the Courts could investigate the title without infringing the comity of nations. But it is impossible to recognize a government and yet claim to exercise jurisdiction over its person or property against its will. Further, the Courts in questions whether a particular person or institution is a sovereign must be guided only by the statement of the sovereign on whose behalf they exercise jurisdiction. As was said by this Court in *Mighell* v. *Sultan of Johore* (1): "When once there is the authoritative certificate of the Queen through her minister of state as to the status of another sovereign, that in the Courts of this country is decisive." In the present case we have from the Foreign Office a recognition of the Soviet Republic in 1921 as the de facto Government, and a statement that in 1917 the Soviet authorities expelled the previous Government recognized by His Majesty. It appears to me that this binds us to recognize the decree of 1918 by a department of the Soviet Republic, and the sale in 1920 by the Soviet Republic of property claimed by them to be theirs under that decree, as acts of a sovereign state the validity of which cannot be questioned by the Courts of this country, unless it is possible to do so for the second reason argued before us, incompatibility with the moral and political policy of the United Kingdom.

This view renders it unnecessary for me to express a final opinion whether and to what extent a recognition of a de facto government is retrospective to previous acts and times. It appears to me that a recognition of a government as de facto the government in one year does not necessarily

(1) [1894] 1 Q. B. 149, 158.

of any other state, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction." On this question the case of *Vavasseur* v. *Krupp* (1) is instructive. Shells alleged to infringe an English patent were landed in this country, but on the Mikado of Japan claiming the goods as the public property of his state the Court ordered them to be released to him, without any inquiry whether in fact they infringed an English patent and so were, if found in England, liable to destruction. If M. Krassin had brought these goods with him into England, and declared on behalf of his Government that they were the property of the Russian Government, in my view no English Court could investigate the truth of that statement. To do so would not be consistent with the comity of nations as between independent sovereign states. In *Morgan* v. *Larivière* (2) the opinions as to the power of the Court to deal with a trust fund in which a foreign government was interested were obiter dicta—as the Court held there was in fact no trust fund. If by any misadventure the authorized representative of a sovereign state should claim property not really belonging to the state it appears to me that the remedy is by diplomatic means between states, not by legal proceedings against an independent sovereign. The case may be different where the sovereign state submits to the jurisdiction as plaintiff, and asks the Court to use its remedies in favour of the plaintiff. But where the sovereign state is defendant I cannot conceive the Courts investigating the truth of its allegation that the goods in question, which it exported from its own territory, are its public property. In *Vavasseur* v. *Krupp* (1) the Mikado, in joining as defendant, was held only to have done so in order more effectively to call the attention of the Court to the fact that inadvertently it had interfered by injunction with the property of a sovereign state. What the Court cannot do directly it cannot in my view do indirectly. If it

(1) (1878) 9 Ch. D. 351. (2) (1875) L. R. 7 H. L. 423, 430.

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titles derived under it as confiscatory and unjust. This was based on the general principle stated by Mr. Dicey in his work on the Conflict of Laws (1) that "English Courts will not enforce a right otherwise duly acquired under the law of a foreign country . . . . (B) where the enforcement of such right is inconsistent with the policy of English law, or with the moral rules upheld by English law, or with the maintenance of English political institutions." When this is expanded later in the same work (2), the only head applicable to this case is (Inconsistency with) "*Morality*," i.e., as supported by English Courts. There are very few instances in which this principle has been applied. Rights derived from a contract for the sale of slaves made in a country where such a sale is legal have been enforced by English Courts: *Santos* v. *Illidge*. (3) Gaming debts incurred abroad where gaming is legal have been enforced here: *Quarrier* v. *Colston* (4); though securities payable in England for gaming debts of the same character have not been enforced: *Moulis* v. *Owen*. (5) Two cases in particular in which English Courts have ignored foreign law of which they disapproved, *Simpson* v. *Fogo* (6) and *Kaufman* v. *Gerson* (7), have been the subject of considerable adverse comment. The former can perhaps be treated as a retaliation by English Courts on foreign states whose tribunals refuse to recognize rights acquired by English law. The latter decision, in which English Courts refused to recognize a contract validly made in France on the ground that it was contrary to English principles of morality, is adversely criticized by Mr. Dicey (8), who treats it as a mistaken application of the sound principle that English Courts will not enforce foreign contracts, valid where made, where the Court deems the contract to be in contravention of some essential principle of justice and morality. But it appears a serious breach of international comity, if a state is recognized as a sovereign independent state, to

(1) 2nd ed. (1908), p. 33.
(2) Ibid. p. 36.
(3) 8 C. B. (N. S.) 861.
(4) (1842) 1 Ph. 147.
(5) [1907] 1 K. B. 746.
(6) 1 H. & M. 195, 247.
(7) [1904] 1 K. B. 591.
(8) Conflict of Laws, 2nd ed. (1908), App. Note 3, p. 727.

recognize that it was the de facto government from the first moment when some of the individuals supporting its cause began to resist or to attack the then established government. It may well be a question when first the struggling body attained such power that it was a government de facto, and over what area, and that you cannot answer that question by knowing that some years later the Sovereign recognized it as the government de facto over a particular area. When that question is to be answered, the Courts must ask the Sovereign for information; but here the Foreign Office letters appear to show that since the beginning of 1918 the Soviet Republic has been the Government de facto of Russia. On the first point therefore I am of opinion that the defendants show a title derived from a recognized sovereign state, which by the comity of nations cannot be questioned in these Courts unless the second ground to be referred to is sufficient justification for questioning it. We were referred to decisions of the Supreme Court of the United States dealing with a similar state of facts: *Oetjen* v. *Central Leather Co.* (1); *Underhill* v. *Hernandez* (2); *Williams* v. *Bruffy*. (3) These decisions, while deserving of the highest respect in our Courts, are not binding on us. But it is satisfactory to find that the principles there stated are in accordance with the views already expressed, except that I should prefer at present to reserve my opinion as to the exact meaning to be given to the principle that "when a Government which originates in revolution or revolt is recognized by the political department of our Government as the de jure Government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the Government so recognized from the commencement of its existence." (4) The definition of the last six words may require very careful consideration.

It remains to consider the argument that the English Courts should refuse to recognize the Soviet legislation and

(1) 246 U. S. 297.
(2) 168 U. S. 250.
(3) 96 U. S. 176.
(4) 246 U. S. 302, 303.

postulate that its legislation is "contrary to essential principles of justice and morality." Such an allegation might well with a susceptible foreign government become a casus belli; and should in my view be the action of the Sovereign through his ministers, and not of the judges in reference to a state which their Sovereign has recognized. The English Courts act on the rule "that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms": *Central Control Board* v. *Cannon Brewery Co.* (1) If it were they must give effect to it, and can hardly be more rigid in their dealings with foreign legislation. Individuals must contribute to the welfare of the state, and at present British citizens who may contribute to the state more than half their income in income tax and super tax, and a large proportion of their capital in death duties, can hardly declare a foreign state immoral which considers (though we may think wrongly) that to vest individual property in the state as representing all the citizens is the best form of proprietary right. I do not feel able to come to the conclusion that the legislation of a state recognized by my Sovereign as an independent sovereign state is so contrary to moral principle that the judges ought not to recognize it. The responsibility for recognition or non-recognition with the consequences of each rests on the political advisers of the Sovereign and not on the judges.

In my view, therefore, on the new materials available since the judgment of Roche J., the plaintiffs fail in their action, and the judgment below should be set aside.

As to costs I agree with the judgment of Bankes L.J.

Appeal allowed.

Solicitors for appellants: *H. W. & S. Patey.*
Solicitors for respondents: *Linklaters & Paines.*

(1) [1919] A. C. 744, 752.

W. H. G.

Stated not to have been overruled by any decision of the House of Lords. THOROGOOD *v.* VAN DEN BERGHS AND JURGENS, LTD. [1951] 1 All E.R. 682.

Applied. THOROGOOD *v.* VAN DEN BERGHS & JURGENS LD. [1951] 2 K. B. 537

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July 7, 8, 15.

[IN THE COURT OF APPEAL.]

In re AN ARBITRATION BETWEEN POLEMIS AND ANOTHER AND FURNESS, WITHY AND COMPANY, LIMITED.

Damages—Remoteness—Negligence—Natural and probable Consequence—Result which could not reasonably have been anticipated—Exception Clause in Charterparty—Exception of Fire—Fire in Ship caused by Negligence of Charterers' Servants—Liability of Charterers.

By a clause in a time charter of a ship "fire" (inter alia) was "always mutually excepted." Besides other cargo the charterers loaded in the hold a quantity of benzine and/or petrol in tins in cases. During the voyage the tins leaked, and in consequence there was a considerable quantity of petrol vapour in the hold. At one of the ports of call it became necessary for the stevedores, who were employed by and were the servants of the charterers, to shift some of the cases of benzine, and for that purpose the stevedores placed a number of heavy planks at the forward end of the hatchway, which they used as a platform for transferring the cases from the lower hold to the 'tween deck. When the sling containing the cases of benzine was being hoisted up, owing to the negligence of the stevedores the rope by which the sling was hoisted or the sling itself came in contact with the boards, causing one of the boards to fall into the hold, and the fall was immediately followed by a rush of flames, the result being the total destruction of the ship. The shipowners claimed from the charterers as damages the value of the ship. The charterers disputed liability, and the dispute was referred to arbitration under a clause in the charterparty. The arbitrators found that the ship was lost by fire; that the fire arose from a spark igniting the petrol vapour in the hold; that the spark was caused by the falling board coming into contact with some substance in the hold; and that the causing of the spark could not reasonably have been anticipated from the falling of the board, though some damage to the ship might reasonably have been anticipated. The charterers contended: (1.) that they were protected from liability by the exception of "fire" in the charterparty; (2.) that the damages were too remote, as it could not reasonably have been anticipated that the falling of the board would have caused a spark:—

Held, (1.) that the exception clause did not protect the charterers against loss by fire caused by the negligence of their servants, there being no express stipulation to that effect; and (2.) that, as the fall of the board was due to the negligence of the charterers' servants, the charterers were liable for all the direct consequences of the negligent act, even though those consequences could not reasonably have been anticipated; and they were therefore liable for the loss of the ship by fire.

The question whether the damage could reasonably have been anticipated is relevant only on the question whether the act is or is not negligent.

Dictum of Pollock C.B. in *Greenland* v. *Chaplin* (1850) 5 Ex. 243, 248 disapproved.

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APPEAL from the judgment of Sankey J. on an award in the form of a special case.

The owners of the Greek steamship *Thrasyvoulos* claimed to recover damages for the total loss of the steamship by fire.

By a charterparty, dated February 21, 1917, Messrs. Polemis and Boyazides, the owners of the Greek steamship *Thrasyvoulos* (hereinafter called the owners), chartered the steamship to Furness, Withy & Co., Ld. (hereinafter called the charterers), for the period of the duration of the war and at charterers' option up to six months afterwards from the day she was placed at the charterers' disposal ready to load in the port of Cardiff, she being then tight, staunch, strong and every way fitted for ordinary cargo service and with full complement of officers, seamen, engineers, and firemen duly shipped for a vessel of her tonnage; to be employed in such lawful trades between any safe ports as charterers might direct with certain exceptions not material to this case. By clause 3, the owners were to provide and pay for all the provisions and wages of the captain, officers, engineers, firemen, and crew, to pay for the insurance of the vessel, war risks excepted, and also for all the engine room stores, and maintain her in a thoroughly efficient state in hull and machinery for ordinary cargo service. By clause 4, the charterers were to provide and pay for all the coals, fuel, port charges, pilotages, agencies, commissions, and all other charges whatsoever, except those before stated. By clause 5, the charterers were to pay for the use and hire of the vessel at the rate of 9572*l.* 16*s.* per calendar month commencing on the day of delivery as above with a clean and clear hold, "hire to continue from the time specified for commencing the charter until the hour of her redelivery to owners (unless lost) at a port in the United Kingdom or continent in same good order and condition as when delivered to them fair wear and tear excepted." By clause 21: "The act of God, the King's enemies, loss or damage from fire on board in hulk or craft, or on shore, arrest and/or restraint of princes, rulers, and people, collision, any act, neglect, or default whatsoever of pilot, master, or crew in the management or navigation of the ship, and all and

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every of the dangers and accidents of the seas, canals, and rivers, and of navigation of whatever nature or kind always mutually excepted." By clause 22, should any dispute arise between the owners and charterers, the matters in dispute were to be referred to three persons in London, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or any two of them, to be final and binding.

The vessel by the directions of the charterers or their agents in or about the months of June and July, 1917, loaded at Nantes a part cargo of cement and general cargo for Casablanca, Morocco. She then proceeded to Lisbon and was loaded with further cargo, consisting of cases of benzine and/or petrol and iron for Casablanca and other ports on the Morocco coast. She arrived at Casablanca on July 17, and there discharged a portion of her cargo. The cargo was discharged by Arab workmen and winchmen from the shore supplied and sent on board by the charterers' agents. The cargo in No. 1 hold included a considerable quantity of cases of benzine or petrol which had suffered somewhat by handling and/or by rough weather on the voyage, so that there had been some leakage from the tins in the cases into the hold. On July 21 it had become necessary to shift from No. 1 lower hold a number of the cases of benzine which were required to be taken on by the ship to Safi, and for this purpose the native stevedores had placed heavy planks across the forward end of the hatchway in the 'tween decks, using it as a platform in the process of transferring the cases from the lower hold to the 'tween decks. There were four or five of the Arab shore labourers in the lower hold filling the slings which, when filled, were hove up by means of the winch situated on the upper deck to the 'tween decks level of the platform on which some of the Arabs in the 'tween decks were working. In consequence of the breakage of the cases there was a considerable amount of petrol vapour in the hold. In the course of heaving a sling of the cases from the hold the rope by which the sling was being raised or the sling itself came into contact with the boards placed across the forward end of

the hatch, causing one of the boards to fall into the lower hold, and the fall was instantaneously followed by a rush of flames from the lower hold, and this resulted eventually in the total destruction of the ship.

The owners contended (so far as material) that the charterers were liable for the loss of the ship; that fire caused by negligence was not an excepted peril; and that the ship was in fact lost by the negligence of the stevedores, who were the charterers' servants, in letting the sling strike the board, knocking it into the hold, and thereby causing a spark which set fire to the petrol vapour and destroyed the ship.

The charterers contended that fire however caused was an excepted peril; that there was no negligence for which the charterers were responsible, inasmuch as to let a board fall into the hold of the ship could do no harm to the ship and therefore was not negligence towards the owners; and that the danger and/or damage were too remote—i.e., no reasonable man would have foreseen danger and/or damage of this kind resulting from the fall of the board.

The three arbitrators made the following findings of fact :—

"(*a*) That the ship was lost by fire.

"(*b*) That the fire arose from a spark igniting petrol vapour in the hold.

"(*c*) That the spark was caused by the falling board coming into contact with some substance in the hold.

"(*d*) That the fall of the board was caused by the negligence of the Arabs (other than the winchman) engaged in the work of discharging.

"(*e*) That the said Arabs were employed by the charterers or their agents the Cie. Transatlantique on behalf of the charterers, and that the said Arabs were the servants of the charterers.

"(*f*) That the causing of the spark could not reasonably have been anticipated from the falling of the board, though some damage to the ship might reasonably have been anticipated.

"(*g*) There was no evidence before us that the Arabs chosen were known or likely to be negligent.

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"(*h*) That the damages sustained by the owners through the said accident amount to the sum of 196,165*l.* 1*s.* 11*d.* as shown in the second column of the schedule hereto"

Subject to the opinion of the Court on any questions of law arising the arbitrators awarded that the owners were entitled to recover from the charterers the before-mentioned sum.

If the Court should be of opinion that the above award was wrong, then the arbitrators awarded that the owners should recover nothing from the charterers

Sankey J. affirmed the award. The charterers appealed.

R. A. Wright K.C. and *S. L. Porter* for the charterers. The damages claimed are too remote. In an action of negligence the measure of damages is the same as in an action for breach of contract. The damages must be such as can reasonably be anticipated as the result of the negligent act. In other words, they must be the natural and probable consequence of the act. In *Greenland* v. *Chaplin* (1) Pollock C.B. said: "I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated. Whenever that case shall arise, I shall certainly desire to hear it argued, and to consider whether the rule of law be not this: that a person is expected to anticipate and guard against all reasonable consequences, but that he is not, by the law of England, expected to anticipate and guard against that which no reasonable man would expect to occur." A similar doubt had been expressed by the Chief Baron in *Rigby* v. *Hewitt.* (2) That dictum has always been accepted. For instance, in Salmond on Torts, 2nd ed., p. 106, it is said: "Damage is too remote if it is neither the intended nor the natural and probable result of the wrongful act. Every man is responsible for damage which he intended to result and which did result from his wrongful act, however improbable

(1) 5 Ex. 243, 248. (2) (1850) 5 Ex. 240, 243.

it may have been. Every man is also liable for the natural and probable results of his wrongful act, even though not intended by him. But no man is liable for consequences neither intended nor probable." In Pollock on Torts, 11th ed., pp. 39, 40, the dictum of Pollock C.B. is cited, and it is said (referring to Beven, Negligence in Law, i., 106): "It is suggested by a learned and lamented author whose opinions are always deserving of attention that this rule applies only 'in determining what is negligence,' and 'not in limiting the consequences flowing from it when once established'; and this position is worked out in an ingenious and elaborate argument." In *Cory* v. *France* (1) Vaughan Williams L.J. said: "In my judgment he (the plaintiff) has always to prove that the negligence of which the defendant is proved to have been guilty was a proximate cause of the injury which is complained of in the action. In considering what is a proximate cause, you may often have to ask the question which was asked in the cases of *Rigby* v. *Hewitt* (2) and *Greenland* v. *Chaplin* (3), namely, was the negligence which was proved against the defendant of such a character that the consequences which followed might reasonably be expected to result under ordinary circumstances from such misconduct?" Then he quotes the language of Pollock C.B. in those two cases. Kennedy L.J. in the same case (4) also quotes with approval the language of Pollock C.B. in *Greenland* v. *Chaplin*. (3) In *Dunham* v. *Clare* (5) Collins M.R., in speaking of the liability of a person in respect of a breach of some duty imposed on him, said that "the liability is measured by what are the reasonable and probable consequences of his breach of duty." See also *In re London, Tilbury and Southend Ry. Co.* (6), per Lord Esher M.R. *Sharp* v. *Powell* (7) is in point. There the defendant's servant, in breach of a police Act, washed a van in a public street, and allowed the waste water to run down the gutter towards a grating

(1) [1911] 1 K. B. 114, 121, 122.
(2) (1850) 5 Ex. 240, 243.
(3) 5 Ex. 248.
(4) [1911] 1 K. B. 133.
(5) [1902] 2 K. B. 292, 296.
(6) (1889) 24 Q. B. D. 326, 329.
(7) (1872) L. R. 7 C. P. 253.

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leading to the sewer, about 25 yards off. In consequence of the cold weather the grating was frozen over, and the water flowed over the paving and there froze. There was no evidence that the defendant's servant knew that the grating was obstructed. The plaintiff's horse, while being led past the spot, slipped upon the ice and was injured. It was held that the damage was not the natural or ordinary consequence of the wrongful act. In the present case the arbitrators have found that it could not reasonably have been anticipated that the negligent act of dropping the plank into the hold would have caused a spark. The damage was not the natural or probable consequence of the act. The charterers were not responsible for starting the spark which set fire to the ship. *Clark* v. *Chambers* (1) was a case of nuisance on a highway, not negligence, and the Court doubted the application in that case of the doctrine laid down by Pollock C.B. in *Greenland* v. *Chaplin* (2) and by the Court of Common Pleas in *Sharp* v. *Powell* (3), saying that the case came within the principle of *Scott* v. *Shepherd.* (4) *Smith* v. *London and South Western Ry. Co.* (5) will be relied upon by the respondents, but the dicta of Channell B. and Blackburn J., on which the respondents rely, apply only to the special facts of that case, and if applicable generally are opposed to the current of authority.

[BANKES L.J. referred to *Weld-Blundell* v. *Stephens.* (6)]

Next, the exception of "fire always mutually excepted" in clause 21 relieves the charterers from liability. The exception covers fire caused by negligence. The language of the clause is general. The rule that the exceptions do not relieve the shipowner from liability for his negligence unless a term to that effect is clearly expressed does not apply to the charterer.

[They cited on this point *Steinman* v. *Angier Line* (7); *Baxter's Leather Co.* v. *Royal Mail Steam Packet Co.* (8);

(1) (1878) 3 Q. B. D. 327.
(2) 5 Ex. 248.
(3) (1872) L. R. 7 C. P. 253.
(4) (1773) 3 Wils. 403; 2 W. Bl. 892; 1 Sm. L. C., 12th ed., 513.
(5) (1870) L. R. 5 C. P. 98; 6 C. P. 14.
(6) [1920] A. C. 956, 983, 984.
(7) [1891] 1 Q. B. 619.
(8) [1908] 2 K. B. 626.

and *Chartered Bank* v. *British India Steam Navigation Co.* (1)]

MacKinnon K.C. and *Dumas* for the owners. In considering whether an act is or is not an act of negligence, the Court is entitled to consider what a reasonable person ought to have anticipated: *Smith* v. *London and South Western Ry. Co.* (2), per Channell B. and Blackburn J.; *Weld-Blundell* v. *Stephens* (3), per Lord Sumner. If the act is an act of negligence, all the damage that directly flows from it is recoverable. The dictum of Pollock C.B. in *Greenland* v. *Chaplin* (4), following his dictum in *Rigby* v. *Hewitt* (5), is the source of the misconception, but it is doubtful whether that dictum is correctly reported in the Exchequer Reports. In the report in the Law Journal (6) the words "who is guilty of negligence" are omitted, the passage reading: "I entertain considerable doubt whether a man is responsible for all the possible consequences that may, under any circumstances, arise in respect of mischief which by no possibility could he have foreseen, and which no reasonable person under any circumstances could be called upon to have anticipated." The dictum as there reported is quite consistent with the respondents' contention. So also in the report of *Rigby* v. *Hewitt* in the Law Journal (7) the words "of his negligence" are omitted after the words "all the possible consequences."

Next, the charterers are not relieved by the exception of "fire." It is a well-established rule, for which it is not necessary to cite authority, that the exception would not relieve a shipowner from the results of a fire caused by negligence unless a stipulation to that effect were clearly expressed. The same rule applies to charterers. There is here no express term relieving the charterers from liability for their negligence. The result is that the respondents' ship has been destroyed owing to the negligence of the charterers' servants, and there is no express term relieving the charterers.

(1) [1909] A. C. 369.
(2) L. R. 6 C. P. 21.
(3) [1920] A. C. 956, 983, 984.
(4) 5 Ex. 248.
(5) 5 Ex. 243.
(6) 19 L. J. (Ex.) 295.
(7) 19 L. J. (Ex.) 292.

Stated not to have been overruled by

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S. L. Porter in reply. The charterers may be liable for the unexpected extent of the damage, which might reasonably be anticipated from the negligent act, but they are not liable for the type of damage which could not reasonably have been anticipated.

Cur. adv. vult.

July 15. The following judgments were read :—

BANKES L.J. By a time charterparty dated February 21, 1917, the respondents chartered their vessel to the appellants. Clause 21 of the charterparty was in these terms. [The Lord Justice read it.] The vessel was employed by the charterers to carry a cargo to Casablanca in Morocco. The cargo included a quantity of benzine or petrol in cases. While discharging at Casablanca a heavy plank fell into the hold in which the petrol was stowed, and caused an explosion, which set fire to the vessel and completely destroyed her. The owners claimed the value of the vessel from the charterers, alleging that the loss of the vessel was due to the negligence of the charterers' servants. The charterers contended that they were protected by the exception of fire contained in clause 21 of the charterparty, and they also contended that the damages claimed were too remote. The claim was referred to arbitration, and the arbitrators stated a special case for the opinion of the Court. Their findings of fact are as follows. [The Lord Justice read clauses (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*g*) set out above.] Then they state the damages, 196,165*l.* 1*s.* 11*d.* These findings are no doubt intended to raise the question whether the view taken, or said to have been taken, by Pollock C.B. in *Rigby* v. *Hewitt* (1) and *Greenland* v. *Chaplin* (2), or the view taken by Channell B. and Blackburn J. in *Smith* v. *London and South Western Ry. Co.* (3), is the correct one. The doubt which I have indicated in reference to what Pollock C.B. really said is due to the fact that, as reported in the Law Journal (4), the Chief Baron does not use the words on which reliance is placed and which

(1) 5 Ex. 243.
(2) 5 Ex. 248.
(3) L. R. 6 C. P. 21.
(4) 19 L. J. (Ex.) 292, 295.

were quoted with approval by Vaughan Williams L.J. in *Cory* v. *France*. (1) Assuming the Chief Baron to have been correctly reported in the Exchequer Reports, the difference between the two views is this: According to the one view, the consequences which may reasonably be expected to result from a particular act are material only in reference to the question whether the act is or is not a negligent act; according to the other view, those consequences are the test whether the damages resulting from the act, assuming it to be negligent, are or are not too remote to be recoverable. Sir F. Pollock in his Law of Torts, 11th ed., pp. 39, 40, refers to this difference of view, and calls attention to the fact that the late Mr. Beven, in his book on Negligence, supports the view founded on *Smith* v. *London and South Western Ry. Co.* (2) In two recent judgments dealing with the question, the view taken by the Court in *Smith* v. *London and South Western Ry. Co.* (2) has been adopted—namely, by the late President (Sir Samuel Evans) in *H.M.S. London* (3), and by Lord Sumner in *Weld-Blundell* v. *Stephens*. (4) In the former case the President said: "The Court is not concerned in the present case with any inquiry as to the chain of causes resulting in the creation of a legal liability from which such damages as the law allows would flow. The tortious act—i.e., the negligence of the defendants, which imposes upon them a liability in law for damages—is admitted. This gets rid at once of an element which requires consideration in a chain of causation in testing the question of legal liability—namely, the foresight or anticipation of the reasonable man. In *Smith* v. *London and South Western Ry. Co.* (2) Channell B. said: 'Where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not . . . . but when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not.'

(1) [1911] 1 K. B. 122.
(2) L. R. 6 C. P. 21.
(3) [1914] P. 72, 76.
(4) [1920] A. C. 983, 984.

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And Blackburn J. in the same case said: 'What the defendants might reasonably anticipate is only material with reference to the question, whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence'"; and after referring to the various phrases used in connection with remoteness of damages he said (1): "But it must be remembered, to use the words of a well-known American author (Sedgwick), that 'the legal distinction between what is proximate and what is remote is not a logical one, nor does it depend upon relations of time and space; it is purely practical, the reason for distinguishing between the proximate and remote causes and consequences being a purely practical one'; and again, to use the words of an eminent English jurist (Sir F. Pollock (2)), 'In whatever form we state the rule of "natural and probable consequences," we must remember that it is not a logical definition, but only a guide to the exercise of common sense. The lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause.'" In the latter case Lord Sumner said (3): "What are 'natural, probable and necessary' consequences? Everything that happens, happens in the order of nature and is therefore 'natural.' Nothing that happens by the free choice of a thinking man is 'necessary,' except in the sense of predestination. To speak of 'probable' consequence is to throw everything upon the jury. It is tautologous to speak of 'effective' cause or to say that damages too remote from the cause are irrecoverable, for an effective cause is simply that which causes, and in law what is ineffective or too remote is not a cause at all. I still venture to think that direct cause is the best expression. Proximate cause has acquired a special connotation through its use in reference to contracts of insurance. Direct cause excludes what is indirect, conveys the essential distinction, which causa causans and causa sine qua non rather cumbrously indicate, and is consistent with the possibility of the concurrence of more direct causes

(1) [1914] P. 78. (2) 11th ed., pp. 35, 36.
(3) [1920] A. C. 983, 984.

than one, operating at the same time and leading to a common result as in *Burrows* v. *March Gas & Coke Co.* (1) and *Hill* v. *New River Co.* (2) As, however, these different epithets and formulæ are used almost indiscriminately, something more must be done than to choose an epithet which has been used in a decided case. It is necessary to consider whether the facts of the case cited raise a question of causation belonging to the same category as that under discussion. The crux of the present question is the intervention of Mr. Hurst between the respondent and Messrs. Comins and Lowe. Further, no want of care has to be proved here against the respondent, for he accepts the decision that he broke his contract by his partner's omission to be careful, though not by any deliberate, intentional or wanton breach. This at once makes it possible to lay aside large classes of authorities. What a defendant ought to have anticipated as a reasonable man is material when the question is whether or not he was guilty of negligence, that is, of want of due care according to the circumstances. This, however, goes to culpability, not to compensation: *Blyth* v. *Birmingham Waterworks Co.* (3); *Smith* v. *London and South Western Ry. Co.* (4), per Blackburn J. Again, what ordinarily happens, or may reasonably be expected to happen, is material where a mere series of physical phenomena has to be investigated and the remoteness of the damage or the reverse is to be decided accordingly. Such a case is *Sharp* v. *Powell* (5), unless indeed it be regarded as a decision on negligence or no negligence. At any rate it is not this case."

In the present case the arbitrators have found as a fact that the falling of the plank was due to the negligence of the defendants' servants. The fire appears to me to have been directly caused by the falling of the plank. Under these circumstances I consider that it is immaterial that the causing of the spark by the falling of the plank could not have been reasonably anticipated. The appellants' junior

(1) (1872) L. R. 7 Ex. 96.
(2) (1868) 9 B. & S. 303.
(3) (1856) 11 Ex. 781.
(4) L. R. 6 C. P. 21.
(5) L. R. 7 C. P. 253.

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counsel sought to draw a distinction between the anticipation of the extent of damage resulting from a negligent act, and the anticipation of the type of damage resulting from such an act. He admitted that it could not lie in the mouth of a person whose negligent act had caused damage to say that he could not reasonably have foreseen the extent of the damage, but he contended that the negligent person was entitled to rely upon the fact that he could not reasonably have anticipated the type of damage which resulted from his negligent act. I do not think that the distinction can be admitted. Given the breach of duty which constitutes the negligence, and given the damage as a direct result of that negligence, the anticipations of the person whose negligent act has produced the damage appear to me to be irrelevant. I consider that the damages claimed are not too remote.

The other point relied upon by the appellants was that the damage having been caused by fire they were protected by clause 21 of the charterparty. To this it was replied that the clause had no application in the case of a fire caused by the negligence of the charterers' servants. I see no reason why a different rule of construction of this exception contained in the charterparty should be adopted in the case of the charterer than would undoubtedly be adopted in the case of the shipowner. In the case of the latter clear words would be required excluding negligence. No such words are found in this clause. Neither shipowner nor charterer can, in my opinion, under this clause claim to be protected against the consequences of his own negligence.

For these reasons I think that the appeal fails, and must be dismissed with costs.

WARRINGTON L.J. A ship owned by the respondents was destroyed by fire while under a time charter to the appellants. The respondents claimed as damages the value of the ship and some incidental expenses. The appellants disputed the claim and the matter was referred to arbitrators, who made their award in the form of a special case in favour of the

respondents, the owners, subject, of course, to the opinion of the Court.

The only question for the Court is whether on the findings of the arbitrators as to facts they were justified in law in making an award in favour of the respondents. Sankey J. has held that they were so justified. The charterers appeal.

The accident happened in the port of Casablanca, in Morocco, to which the ship had been directed by the charterers with a cargo which included cases of benzine and/or petrol stored in No. 1 hold. These cases had leaked on the voyage and there was a considerable quantity of petrol vapour in the hold. Arab stevedores employed by the charterers were engaged in shifting certain cargo in the hold, and for the purpose of their work had placed some heavy planks across the forward end of the hatchway. In the course of the work one of the planks came in contact with the sling or the rope by which the sling was worked, was thereby dislodged, and fell into the hold. The fall was instantly followed by a rush of flames, and the result was the total destruction of the ship. The findings of fact have already been read by Bankes L.J. and I need not read them again.

The charterers contend, first, that they are relieved from liability by the exception clause in the charterparty; and, secondly, that damages for the loss of the ship cannot be recovered, inasmuch as the causing of the spark was something that could not reasonably have been anticipated, and therefore the destruction of the ship was not the natural or probable consequence of the negligent act, and the damage was too remote.

As to the first point, the exception clause is in the following terms. [The Lord Justice read it.] There is, therefore, no express exception of loss by fire caused by negligence. The present claim is based on negligence. It appears to be well settled that in such a contract as the present the exceptions would not be construed so as to excuse the shipowner for loss of the nature described if caused by the negligence of himself or his servants, unless expressly so framed: Carver

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on Carriage by Sea, ss. 14, 22; and as to bills of lading per Bowen L.J. in *Steinman* v. *Angier Line* (1); and in my opinion the same construction must be given to the clause when it is the liability of the charterers which is in question. This defence therefore fails.

As to the second point, it is contended that "a person guilty of negligence is not responsible in respect of mischief which could by no possibility have been foreseen and which no reasonable person would have anticipated." (2) We are asked, in effect, to say that the doubt on this point expressed by Pollock C.B. in *Greenland* v. *Chaplin* (2) is well founded and that his tentative view set forth in that case and in *Rigby* v. *Hewitt* (3) ought to prevail. There is some doubt whether the words of the Chief Baron in *Greenland* v. *Chaplin* (2) are correctly reported in the Exchequer Reports, for in the report in the Law Journal (4) the words "guilty of negligence" are omitted, so that in the Law Journal report the passage reads: "I entertain considerable doubt whether a man is responsible in respect of mischief," and so on, leaving out the words "guilty of negligence." However this may be, the law on this point is, in my opinion, correctly stated in Beven on Negligence, 3rd ed., vol. i., p. 85. I need not read the passage.

The result may be summarised as follows: The presence or absence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent. If it be thus determined to be negligent, then the question whether particular damages are recoverable depends only on the answer to the question whether they are the direct consequence of the act. Sufficient authority for the proposition is afforded by *Smith* v. *London and South Western Ry. Co.* (5), in the Exchequer Chamber, and particularly by the judgments of Channell B. and Blackburn J. Channell B. says (6): "I quite agree that where there is no direct evidence of negligence, the question what a reasonable man might foresee is

(1) [1891] 1 Q. B. 623.
(2) 5 Ex. 248.
(3) 5 Ex. 243.
(4) 19 L. J. (Ex.) 295.
(5) L. R. 6 C. P. 14.
(6) Ibid. 21.

of importance in considering the question whether there is evidence for the jury of negligence or not, and this is what was meant by Bramwell B. in his judgment in *Blyth* v. *Birmingham Waterworks Co.* (1) referred to by Mr. Kingdon; but when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not." Blackburn J. says (2): "I also agree that what the defendants might reasonably anticipate is, as my Brother Channell has said, only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence." In the present case it is clear that the act causing the plank to fall was in law a negligent act, because some damage to the ship might reasonably be anticipated. If this is so then the appellants are liable for the actual loss, that being on the findings of the arbitrators the direct result of the falling board: see per Lord Sumner in *Weld-Blundell* v. *Stephens*. (3)

On the whole in my opinion the appeal fails and must be dismissed with costs.

SCRUTTON L.J. The steamship *Thrasyvoulos* was lost by fire while being discharged by workmen employed by the charterers. Experienced arbitrators, by whose findings of fact we are bound, have decided that the fire was caused by a spark igniting petrol vapour in the hold, the vapour coming from leaks from cargo shipped by the charterers, and that the spark was caused by the Arab workmen employed by the charterers negligently knocking a plank out of a temporary staging erected in the hold, so that the plank fell into the hold, and in its fall by striking something made the spark which ignited the petrol vapour.

On these findings the charterers contend that they are not liable for two reasons: first, that they are protected by an exception of "fire" which in the charter is "mutually excepted"; secondly, that as the arbitrators have found that

(1) 11 Ex. 781. (2) L. R. 6 C. P. 21.
(3) [1920] A. C. 983, 984.

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it could not be reasonably anticipated that the falling of the board would make a spark, the actual damage is too remote to be the subject of a claim. In my opinion both these grounds of defence fail.

An excepted perils clause, if fully expanded, runs that one of the parties undertakes to do something unless prevented by an excepted peril, in which case he is excused. But where he has an obligation to do some act carefully, if he fails in his obligation, and by his negligence an excepted peril comes into operation and does damage, the excepted peril does not prevent him from acting carefully, and he is liable for damages directly flowing from his breach of his obligation to act carefully, though the breach acts through the medium of an excepted peril. It is a commonplace of mercantile law that if a peril of the sea is brought into operation by the carelessness of the shipowner or his servants, he is liable, though perils of the sea are excepted perils, unless he has also a clause excepting the negligence of his servants. In the same way, though the charterer has an exception of fire in his favour, he will be liable if the fire was directly caused by his servants' negligence, for it was not fire that prevented them from being careful. This disposes of the first defence.

The second defence is that the damage is too remote from the negligence, as it could not be reasonably foreseen as a consequence. On this head we were referred to a number of well known cases in which vague language, which I cannot think to be really helpful, has been used in an attempt to define the point at which damage becomes too remote from, or not sufficiently directly caused by, the breach of duty, which is the original cause of action, to be recoverable. For instance, I cannot think it useful to say the damage must be the natural and probable result. This suggests that there are results which are natural but not probable, and other results which are probable but not natural. I am not sure what either adjective means in this connection; if they mean the same thing, two need not be used; if they mean different things, the difference between them should be defined. And as to many cases of fact in which the

distinction has been drawn, it is difficult to see why one case should be decided one way and one another. Perhaps the House of Lords will some day explain why, if a cheque is negligently filled up, it is a direct effect of the negligence that some one finding the cheque should commit forgery: *London Joint Stock Bank* v. *Macmillan* (1); while if some one negligently leaves a libellous letter about, it is not a direct effect of the negligence that the finder should show the letter to the person libelled: *Weld-Blundell* v. *Stephens*. (2) In this case, however, the problem is simpler. To determine whether an act is negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damage; if he would not, the act is not negligent. But if the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act, except that they could not avoid its results. Once the act is negligent, the fact that its exact operation was not foreseen is immaterial. This is the distinction laid down by the majority of the Exchequer Chamber in *Smith* v. *London and South Western Ry. Co.* (3), and by the majority of the Court in Banc in *Rigby* v. *Hewitt* (4) and *Greenland* v. *Chaplin* (5), and approved recently by Lord Sumner in *Weld-Blundell* v. *Stephens* (6) and Sir Samuel Evans in *H.M.S. London*. (7) In the present case it was negligent in discharging cargo to knock down the planks of the temporary staging, for they might easily cause some damage either to workmen, or cargo, or the ship. The fact that they did directly produce an unexpected result, a spark in an atmosphere of petrol vapour which caused a fire, does not relieve the person who was negligent from the damage which his negligent act directly caused.

(1) [1918] A. C. 777.
(2) [1920] A. C. 956.
(3) L. R. 6 C. P. 14.
(4) 5 Ex. 240.
(5) 5 Ex. 243.
(6) [1920] A. C. 983, 984.
(7) [1914] P. 76, 77.

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For these reasons the experienced arbitrators and the judge appealed from came, in my opinion, to a correct decision, and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for charterers : *Downing, Handcock, Middleton & Lewis.*

Solicitors for owners : *Holman, Fenwick & Willan.*

W. F. B.

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GREAT CENTRAL RAILWAY COMPANY *v.* BATES.

Negligence—Occupier of Warehouse—Duty Towards Persons coming on Premises—Injury to Police-constable entering at Night by Doors left Open.

A police-constable, seeing the door of the defendant's warehouse open after dark, and in order to see that everything was right, and in the execution of his duty, entered the warehouse and injured himself by falling into an unfenced sawpit inside :—

Held, that he had no legal right to enter, being neither an invitee nor a licensee, but that even assuming he had, the defendant was under no duty to him to make the place safe for him or to warn him of the danger.

APPEAL from the Great Grimsby County Court before Lord Sterndale M.R. and Atkin L.J., sitting as additional judges of the King's Bench Division.

On November 26, 1920, at about 6.10 P.M., one Police-constable Thompson, employed in the police force of the plaintiffs, the respondent company, while on patrol discovered one of the sliding doors of the defendant's warehouse open. He went in in order to see that everything was right, and in the execution of his duty, and fell into a sawpit inside, close to the sliding doors, and was injured. The plaintiffs, his employers, paid him compensation under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), and then, under s. 6, sub-s. 2, sought by an action in the county court to be indemnified by the defendant on the ground that the injury

was caused under circumstances creating a legal liability in the defendant.

The constable had been duly sworn and appointed a special constable under s. 273 of the Manchester, Sheffield and Lincolnshire Railway Act, 1849 (12 & 13 Vict. c. lxxxi.), which further provided that: "every person so appointed and sworn . . . . shall have power to act as a constable for the preservation of the peace, and for the security of persons and property against felonies and other unlawful acts within the limits of the said premises . . . . and . . . . shall have, use, exercise, and enjoy all such powers, authorities, protections, and privileges, for the apprehending offenders, as well by night as by day, and for doing therein all acts, matters, and things for the prevention, discovery, and prosecution of felonies and other offences, and for the preservation of the peace, as constables duly appointed have. . . . ." The defendant's premises were "within the limits of the said premises" within the meaning of the above section.

The county court judge gave judgment for the plaintiffs.

The defendant appealed.

Holman Gregory K.C. and *Shakespeare* for the defendant. The defendant is not liable. The constable was a trespasser technically; he was neither an invitee nor a licensee, and took the premises as he found them. Even if he were rightly on the premises it was by virtue of some overriding power, and not by invitation of the defendant, who was therefore under no duty to him to take care or to warn him.

[Sir Howard Vincent's Police Code, 15th ed., p. 75, tit. "Doors and windows open," was referred to.]

du Parcq and *H. Barrs Davies* for the plaintiffs. The constable was lawfully on these premises, there being a distinction between private premises such as these were and a dwelling house. He was rightfully there in pursuance of a public duty—namely, a duty to see that everything was all right. The right to entry must be implied from the fact that it was the constable's duty to prevent and detect crime, and the doors being open was a circumstance giving rise

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to suspicion. In the American case of *Low* v. *Grand Trunk Ry. Co.* (1) it was held that a customs officer who went on to a private wharf to prevent and detect smuggling and was injured by reason of its defective state was entitled to recover damages. Although lawfully on these premises the constable was neither an invitee nor a licensee, but belonged to a third class, that of persons lawfully there, and was therefore in the same position as an invitee: see the judgment of Buckley L.J. in *Norman* v. *Great Western Ry. Co.* (2) Once it is found that the constable was there lawfully the judge must ask himself if there was any danger to such a person; and there manifestly was danger in the present case.

No reply was called for.

Lord Sterndale M.R. This is an appeal from the Great Grimsby County Court. It appears that a constable named Thompson was injured while acting in the execution of his duty, and was paid compensation by his employers, the plaintiffs, under the provisions of the Workmen's Compensation Act, 1906, and they now, under the provisions of s. 6, sub-s. 2, of that Act claim to be indemnified by the defendant.

The facts are these. The injured man was a properly appointed policeman and was acting in an area in which he had authority to act. Within that area the defendant had a warehouse, one side of which adjoined the docks, and the other side the street, and on the side adjoining the street were sliding doors on the inside of which was a sawpit, across which was a gangway. At about 6 p.m. on November 26 last the constable was passing this place on his patrol, some men being still at work in the docks, but not in the warehouse. He saw that the doors were partly open, so he opened them wider and walked in and fell into the sawpit and injured himself. Apparently he saw a bicycle on the far side and went to put it in a safer place. The question is whether the plaintiffs in these circumstances can be indemnified, the question as to the defendant's negligence being the same as

(1) (1881) 72 Maine Rep. 313. (2) [1915] 1 K. B. 584, 592.

if the constable himself was claiming damages from him. In my opinion they can not. Although it was a reasonable and proper thing in the circumstances for the constable to enter these premises when he found the doors open, I am not at all satisfied that he had a legal right to do so. But even if he had I fail to see any obligation on the defendant to keep these premises safe for such a person. He was neither an invitee nor a licensee, and I see no obligation either to fence the sawpit or warn him of the danger. I therefore think that the defendant is not liable, and that the appeal must be allowed.

ATKIN L.J. I agree. The right of the plaintiff to recover depends upon whether the policeman was injured under circumstances creating a legal liability in the defendant in the terms of s. 6 of the Workmen's Compensation Act, 1906. The question raised is whether this constable—who had the powers of a common law constable—had the right to enter upon private premises not a dwelling house. It is not suggested that he suspected a felony or suspected that there was a felon within the premises, nor had he any warrant to arrest anybody on the premises, nor was he in pursuit of any criminal who he thought might be on the premises. He went in because having seen the door open he caught sight of a bicycle on the other side of the shed, and he thought he would take it to a place of safety on some police premises. In doing so he fell into a sawpit which was close to the door.

Now it appears to me that he had no right to enter these premises at all, and I think that counsel for the respondent has been a little hard put to it to defend the right of entry in these circumstances. It can hardly be suggested that the right exists in respect of a dwelling house. If it did the privacy of an Englishman's dwelling house would be most materially curtailed. In view of the limitations that have been laid down over and over again as to the right of a constable to force a door, and as to the limitations of his powers unless he has a warrant, or in cases of felony, it appears to me quite impossible to suggest, merely because a constable

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may suspect there is something wrong, that he has a right to enter a dwelling house either by opening a door or by entering an open door or an open window and go into the house. It is true that a reasonable householder would not as a rule object if the matter was done bona fide and no nuisance was caused. But the question is whether the constable has the right to enter.

This is a matter of very considerable importance, because the case has been put on the analogy of a person having a right as a matter of public duty to enter into premises, and we know that such powers and privileges are occasionally given to persons who are not constables. It appears to be very important that it should be established that nobody has a right to enter premises except strictly in accordance with authority.

Even if this constable had a right to enter, which he had not, it appears to me that there was no evidence of any breach of duty towards him on the part of the defendant, because it seems to me plain that the duty which would be owed to persons who might reasonably be expected to come into the premises within ordinary business hours would be quite different to any suggested duty on the unexpected visit of a constable coming in the night and entering the premises in the present circumstances. To my mind the evidence is entirely consistent with the defendant having taken reasonable care for the protection of everybody whom he might reasonably expect to come upon the premises, and I cannot assume that a householder or owner of premises is bound to take special precautions to guard and protect persons who may come unexpectedly upon his premises during the night in order to satisfy themselves that no crime has been committed therein.

I agree that the appeal should be allowed.

Appeal allowed.

Solicitor for plaintiffs: *Dixon H. Davies.*

Solicitors for defendant: *C. J. Smith & Hudson, for Walter West, Great Grimsby.*

W. L. L. B.

[IN THE COURT OF APPEAL.]

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May 26, 27, 30; *July* 25.

F. L. SMIDTH AND COMPANY *v.* F. GREENWOOD (Surveyor of Taxes).

Revenue—Income Tax—Trade exercised within United Kingdom—Assessment of non-resident Persons in Name of Branch—Income Tax Act, 1842, (5 & 6 *Vict. c.* 35), *s.* 41—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *Sch. D—Finance* (*No.* 2) *Act*, 1915 (5 & 6 *Geo.* 5, *c.* 89), *s.* 31.

By s. 31, sub-s. 2, of the Finance (No. 2) Act, 1915, "A non-resident person shall be chargeable in respect of any profits or gains arising, whether directly or indirectly, through or from any branch, factorship, agency, receivership, or management, and shall be so chargeable under s. 41 of the Income Tax Act, 1842, as amended by this section, in the name of the branch, factor, agent, receiver, or manager":—

Held, that the sub-section was not a charging sub-section, but that it merely summed up the effect of s. 41 of the Act of 1842 as extended by sub-s. 1 of s. 31 of the Act of 1915, still keeping within the limits of Sch. D.

The respondents were a Danish firm resident in Copenhagen manufacturing and dealing in cement-making and other similar machinery which they exported all over the world. They had an office in London in charge of a qualified engineer who was their whole-time servant. He received inquiries for machinery such as the respondents could supply, sent to Denmark particulars of the work which the machinery was required to do, including samples of materials to be dealt with, and when the machinery was supplied he was available to give the English purchaser the benefit of his experience in erecting it. The contracts between the respondents and their customers were made in Copenhagen and the goods were shipped f.o.b. Copenhagen. The Commissioners held that the respondents exercised a trade within the United Kingdom and were assessable to income tax. This decision was on appeal reversed by Rowlatt J. On appeal:—

Held, that the place where a trade was exercised was the place where the transactions forming the alleged business were closed, in the case of a selling business by the sale of the commodity, and the profit thereby realized, and that therefore the respondents exercised their trade in Denmark, and that they could not in respect of the same profits and gains exercise their trade elsewhere.

Held, further, that s. 31, sub-s. 2, of the Finance (No. 2) Act, 1915, did not bring into taxation profits made by non-residents from a trade not exercised in the United Kingdom, and that therefore assuming but without deciding that the London office was a "branch" of the respondents' business the respondents could not be assessed through it upon the profits which they made by trading with this country.

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Grainger v. *Gough* [1896] A. C. 325 and *Sulley* v. *Attorney-General* (1860) 5 H. & N. 711 applied.
Decision of Rowlatt J. [1920] 3 K. B. 275 affirmed.

APPEAL from a decision of Rowlatt J. (1) on a case stated by the Commissioners for the General Purposes of the Income Tax Acts.

The case stated is fully set out in the report of the case in the Court below, and the following statement of facts, taken from the judgment of Atkin L.J., will therefore be sufficient for the purposes of the present report: "The material facts that emerge are that the respondents are a Danish firm resident in Denmark and manufacture there machinery for cement and brickworks and other similar industries. They rent an office in London in their own name, which is occupied by a Mr. Robinson, an engineer, who is paid by the respondents by salary and bonus on similar terms to those under which all the respondents' employés are paid. Mr. Robinson advises prospective purchasers here, takes samples of earth, etc., which he forwards to Copenhagen. Contracts are finally negotiated in Denmark and made there. The goods are delivered f.o.b. Copenhagen, the respondents as a rule undertaking to arrange the necessary shipping. Terms of payment appear to vary. Agreements said to be typical are annexed to the case. Two of them, dated in 1913 and 1916, provide that all moneys are to be paid in England in English currency. The third, dated in 1918, has no such provision. The case finds that since the war (a period which covers all the assessments now in question) drafts have been paid into a London bank as agents for the Danish Bank who hold in Denmark the respondents' account. Provision is made in the contracts for the supply by the respondents of an engineer to supervise the erection of the machinery at the purchasers' expense; but, whether the purchasers avail themselves of this stipulation or not, Mr. Robinson has a general oversight of all important installations and advises purchasers as to any difficulties in erection.

(1) [1920] 3 K. B. 275.

Rowlatt J. held that the respondents (the appellants before the Commissioners) exercised their trade in Denmark, and that they could not in respect of the same profits and gains exercise their trade elsewhere.

The Crown appealed. The appeal was heard on May 27, 30, 1921.

Sir Gordon Hewart A.-G. and *R. P. Hills* for the Crown. There are two questions in this case: (1.) whether the respondents, a non-resident Danish firm, are assessable to income tax under Sch. D in respect of a trade exercised by them in this country; and (2.) whether they are chargeable under s. 31, sub-ss. 1, 2, of the Finance (No. 2) Act, 1915, in respect of profits or gains arising directly or indirectly "through or from any branch."

As to the first point the Commissioners have found as a fact that the respondents exercise their trade within the United Kingdom. There was ample material upon which they could so find. Sankey J. in *Weiss, Biheller & Brooks* v. *Farmer* (1) said: "In my view this is mainly a question of fact, and the appellant company are not entitled to succeed unless there was no evidence upon which the Commissioners could have come to their determination."

The present case is distinguishable from *Grainger* v. *Gough*.(2) The facts are stronger here. The respondents rent an office in this country and employ there a whole-time servant who receives a salary and is engaged in their trade alone. If he had authority to sign contracts here there would be no question that they carried on their business in this country. It cannot be that the mere absence of that ingredient prevents the firm from being regarded as carrying on their business here: see also *Erichsen* v. *Last*. (3)

As to the second point the Commissioners have found that the respondents' office at Westminster is a branch of their business. Mr. Robinson is doing everything there that is

(1) [1918] 2 K. B. 725, 730. (2) [1896] A. C. 325.
(3) (1881) 8 Q. B. D. 414.

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necessary to facilitate the carrying on of the respondents' business.

[YOUNGER L.J. Is he not rather employed as an agent, and not conducting a branch ?]

He is doing everything that is necessary for the business except manufacturing and signing contracts. The respondents are liable, under s. 31 of the Act of 1915, for income tax upon profits or gains arising directly or indirectly from that branch. The Act extends the law beyond *Grainger* v. *Gough*. (1)

Sir William Finlay K.C. and *Bremner* for the respondents. The real point is whether the respondents are carrying on business within the United Kingdom, and it is submitted that they are not. The governing test is, where are the contracts made ? : *Grainger* v. *Gough* (2) ; *Sulley* v. *Attorney-General*. (3) This case is covered by *Lovell & Christmas, Ld.* v. *Commissioner of Taxes*. (4)

On the facts of this case the respondents do not exercise their trade in this country.

On the other point it is impossible to hold that the Westminster office of the respondents is a branch of their business. A consulting engineer who cannot and does not sell cannot be said to carry on a branch. Looking after machinery falls very far short of carrying on a branch. A branch is a place where some business can be done. The activities of Mr. Robinson before and after the contracts are made do not amount to an exercise of the respondents' trade. He merely gives information to customers and affords help in supervising the erection of machinery. The argument of the Attorney-General that the effect of s. 31, sub-s. 2, of the Act of 1915 is to supersede *Grainger* v. *Gough* (1) is untenable.

It is submitted that a trade is exercised where the real profit-making business is carried on. It is for the Court to decide whether the trade is carried on in the United Kingdom, and not for the Commissioners.

Sect. 31 is a mere machinery section as distinguished from

(1) [1896] A. C. 325.
(2) [1896] A. C. 325, 340.
(3) 5 H. & N. 711.
(4) [1908] A. C. 46.

a charging section. It proceeds by amending s. 41 of the Income Tax Act, 1842, which is not a charging section at all. It extends s. 41 and defines the particulars as to which it shall be extended. Sub-s. 3 was intended to deal with companies in America which sold to English companies on such terms that the English companies made no profits. It did this by treating the English companies as the agents of the English companies.

[They also referred to *Crookston Bros.* v. *Furtado.* (1)]

R. P. Hills in reply. In *Grainger* v. *Gough* (2) there was no question as to where the deliveries were made. The House of Lords there held that the contract in essence was made in England. As to partial trading see *San Paulo* (*Brazilian*) *Ry. Co.* v. *Carter.* (3) It is submitted that sub-s. 2 of s. 31 of the Act of 1915 imposed a new charge on non-resident traders, otherwise the whole sub-section is meaningless and adds nothing to sub-s. 1. It is said that unless you get something under Sch. D you do not get anything at all and reference is made to the Income Tax Act, 1918. Under the old Acts the schedules were not in themselves complete. They were modified by rules and cases. The effect of s. 31 is to modify the schedules to the extent mentioned in the sub-section. No one suggests that the rules and cases under Sch. D are charging sections though some of them have that effect. In the Act of 1918 the rules applicable to Sch. D plainly explain their applicability. The old provisions are brought up to date. The rules and cases define the subject-matter of the charge. If sub-s. 2 of s. 31 gives a charge the Act of 1918 has not removed it. It is incredible to think that Parliament intended to remove or increase charges by a Consolidation Act. If there was an existing charge then the Act of 1918 must be so read as to give effect to it. In *Gillette Safety Razor, Ld.* v. *Inland Revenue Commissioners* (4) it was held that sub-s. 3 of s. 31, which deals with persons who trade together, added a new charge. Sub-s. 3 like sub-s. 2 was drafted without any reference to Sch. D. Sub-s. 2 imposes a tax on money which

(1) (1910) 5 Tax Cas. 602.
(2) [1896] A. C. 325.
(3) [1896] A. C. 31.
(4) [1920] 3 K. B. 358.

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is leaving this country and applies to cases where the sales are here.

[He also referred to *Turner* v. *Rickman*. (1)]

Cur. adv. vult.

July 25. LORD STERNDALE M.R. read the following judgment: In this case the Crown appeals against the decision of Rowlatt J. by which the learned judge held that the respondents are not liable to be assessed for income tax. I think I may take the facts as stated by Rowlatt J. in these words: "The appellants [the present respondents] are resident in Copenhagen, but they have an office in London in charge of a representative with engineering qualifications who is their whole-time servant. He receives inquiries for machinery such as the appellants can supply, sends to Denmark particulars of the work which the machinery is required to do including samples of materials to be dealt with, and when the machinery is supplied he is available to give the English purchasers the benefit of his experience in erecting it. The contracts, however, between the appellants and their customers are made in Copenhagen and the goods are shipped f.o.b. Under these circumstances the Commissioners have held that the appellants exercised a trade within the United Kingdom, and it is contended on behalf of the Crown that the acts done by or on behalf of the appellants in the United Kingdom together with their maintenance of an office and representative here, is evidence sufficient to justify that finding." But I wish to add to this statement the following paragraphs from the case stated by the Commissioners: Para. 2. "The appellants"—that is, the present respondents—"rent an office as sub-tenants from a Mr. Nash at 9 Bridge Street, Westminster. The name of the firm is on the office door and in the Post Office Directory." Para. 3. "The appellants employ Mr. Sidney Greenwood Robinson as consulting engineer at their office 9 Bridge Street aforesaid, whose duty it is to discuss with

(1) (1898) 4 Tax Cas. 25, 34.

prospective purchasers as to their requirements, to inspect the site of any proposed installation of machinery, take samples of earth, etc., and report and forward the samples to the appellants at Copenhagen. The samples are tested in the firm's laboratory at Copenhagen and plans drawn up there." Para. 11. ". . . . (*j*) It was decided by the appellants in 1901 that business in this country would be facilitated and increased by their having a resident engineer to act as a 'go-between' between buyer and manufacturers in connection with technical matters. (*k*) The business of the appellants in the United Kingdom and also elsewhere had increased considerably since he (Mr. Robinson) had been appointed. Generally intending customers would apply direct to the firm in Copenhagen, but they might address an enquiry to Mr. Robinson who would refer them to the firm in Copenhagen. . . . . (*p*) The appellants sometimes supplied a supervising engineer from Copenhagen at the purchaser's request and expense but he (Mr. Robinson) has the general oversight of the erection of all important installations of the appellants' machinery in the United Kingdom and explains any difficulty the erectors may have in following the plans without further charge to the purchasers."

It clearly appears from this that Mr. Robinson gives substantial help in the carrying out of the respondents' contracts and has something material to do with the preliminary negotiations, but he does not and cannot conclude any contracts. In these circumstances the Crown contended that the respondents exercised a trade within the United Kingdom within the meaning of Sch. D of the Income Tax Act, 1842, while the respondents contended that the facts of the contracts being made and the goods delivered without the United Kingdom was conclusive to show that the respondents did not exercise a trade within the United Kingdom. In support of this contention they relied chiefly upon *Grainger* v. *Gough* (1) and *Sulley* v. *Attorney-General*. (2) I am not prepared to say that these cases in which the circumstances were quite different from the present, support the

(1) [1896] A. C. 325. (2) 5 H. & N. 711.

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respondents' contention to its fullest extent, but I do think that they establish that the facts mentioned above are very important, perhaps the most important, matters which have to be considered in a case of this kind, and I think that, taking them as a guide, such help as was given here in the negotiation of contracts and their execution by Mr. Robinson is not enough to justify a finding that the respondents exercised a trade within the United Kingdom within the meaning of the Income Tax Acts. I doubt if it is possible, and in any case I do not think that it is necessary, to lay down any exact definition of what constitutes such an exercise of trade, but I think in their finding against the respondents on this point the Commissioners have not been guided by the principles of law as laid down in the decided cases, and therefore their finding cannot be upheld. I think Rowlatt J. was right in so holding, and on that point the appeal fails.

The Crown, however, relied upon another contention, and a most important one, for if it be correct it enables the Revenue authorities to assess persons resident abroad upon certain profits, although they do not exercise a trade within the United Kingdom, and therefore materially alters the basis of taxation. This argument is founded on s. 31, sub-s. 1 (*a*), (*b*), and sub-s. 2, of the Finance (No. 2) Act, 1915. Sect. 31, sub-s. 1, is in these terms: "Section 41 of the Income Tax Act, 1842 (which relates to the charge of income tax in special cases), shall, so far as it relates to the taxation of non-residents, be extended—(*a*) so as to make non-resident persons chargeable to income tax in the name of any branch or manager as well as in the name of any factor, agent, or receiver; and (*b*) so as to make non-resident persons so chargeable, although the branch, factor, agent, receiver, or manager may not have the receipt of the profits or gains of the non-resident." Sub-s. 2 is as follows: "A non-resident person shall be chargeable in respect of any profits or gains arising, whether directly or indirectly, through or from any branch, factorship, agency, receivership, or management, and shall be so chargeable under section 41 of the Income

Tax Act, 1842, as amended by this section, in the name of the branch, factor, agent, receiver, or manager."

It is said that the office which Mr. Robinson attends is a branch of the respondents' business, and that the effect of s. 31, sub-s. 2, is to make the respondents liable for income tax upon any profits or gains arising, whether directly or indirectly, through or from that branch, although they did not exercise a trade within the United Kingdom according to Sch. D. The language of the sub-section at first sight seems to support this argument, but it is necessary to consider its context and the objects of s. 31. Sect. 31 is only for the purpose of extending the operations of s. 41 of the Income Tax Act, 1842. That section is not a charging section and only relates to the method of charging persons who are made chargeable under Sch. D. The duties mentioned in that section are the duties charged by Sch. D. It has been called only a machinery section—i.e., a section which provides a method of carrying out the charge imposed by Sch. D. I think this is its effect, and the expression "machinery" has no doubt often been used, and is convenient, but I think it has also often been used in a wider sense than was intended by those who first used it, and may be fallacious, and I prefer not to use it. Sect. 31, sub-s. 1, I think clearly does nothing more than extend the method provided by s. 41 of carrying out the charge imposed by Sch. D, and it would be very strange if another sub-section of the same section imposed an entirely new charge not within the schedule at all. I agree with Rowlatt J. that such a thing, if intended, should be carried out with the greatest clearness, and that if a reasonable meaning can be given to the sub-section without producing that effect such a meaning should be given. I think this meaning can be given to it by adopting the construction suggested by the respondents—namely, that it merely points out or, so to speak, sums up the effect of s. 41 of the Act of 1842 as extended by s. 31 of the Act of 1915, still keeping within the limits of the charge of Sch. D. It is true that looked at from this point of view, sub-s. 2 is not of much use and might have been left out without much if any loss of

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effect. Redundancy however is not unknown in legislation. I think it is better to impute such redundancy than to hold that such an important alteration has been made in the basis of taxation as the abolition of the condition of exercise of trade within the United Kingdom before a person not there resident can be taxed. To take the latter course would, I think, be to violate the well-known canon of construction of taxing Acts, that no one is to be taxed except by express words.

I think this interpretation of sub-s. 2 is strongly supported by the Income Tax Act, 1918. It was decided, whether wisely or not, to retain the old form of legislation by schedules and cases, and Sch. D, for the purposes of this case, stands as it was. To this schedule and others there are enacted general rules and rules 5 and 6 of those general rules to Schs. A, B, C, D and E embody sub-ss. 1 and 2 of s. 31 of the Finance (No. 2) Act, 1915, except that the expression "assessable and chargeable" is used instead of only "chargeable." The natural result of this legislation is, I think, to show that the provisions of these sub-sections embodied in the rules of 1918 are intended only as a means of carrying out the charge imposed by the schedule and not as an extremely important alteration of the charge imposed by the schedule itself. I think that subsequent legislation dealing with previous enactments may be considered with reference to those enactments, and although I should have come to the same conclusion apart from the Act of 1918 it does in my opinion strongly support that conclusion.

Assuming, therefore, that the office in London was a branch of the respondents' business, as to which I express no opinion, I think that the respondents are not liable to assessment, as they do not exercise a trade within the United Kingdom.

The appeal fails also on this latter point and must be dismissed with costs.

ATKIN L.J. read the following judgment: This case arises upon an assessment to income tax made upon the respondents for the years 1914, 1915, 1916, 1917 and 1918. The

Commissioners held all the assessments to be good subject to a case. Before the hearing of the case it was admitted by the Crown that the assessments for 1914 and 1915 could not be supported, as, until the Finance (No. 2) Act, 1915, there was no machinery for assessing the respondents, who were non-residents, in their firm name or at all. The only assessments we have to deal with are those for 1916, 1917 and 1918.

I do not propose to restate the facts as found in the case. [His Lordship stated shortly the facts as above set out and continued:] The question is whether the profits brought into charge are "profits arising or accruing" to the respondents "from any trade . . . . exercised within the United Kingdom" within the meaning of Sch. D of the Income Tax Act, 1853. The question is not whether the respondents carry on business in this country. It is whether they exercise a trade in this country so that profits accrue to them from the trade so exercised.

We have the guidance of the House of Lords on this subject in *Grainger* v. *Gough*. (1) Lord Herschell, after pointing out that there is a difference between trading in a country and trading with a country, says: "How does a wine merchant exercise his trade? I take it, by making or buying wine and selling it again, with a view to profit." Similarly a manufacturer of machinery exercises his trade by making the machinery and selling it again, with a view to a profit. There are indications in the case cited and other cases that it is sufficient to consider only where it is that the sale contracts are made which result in a profit. It is obviously a very important element in the inquiry, and if it is the only element the assessments are clearly bad. The contracts in this case were made abroad. But I am not prepared to hold that this test is decisive. I can imagine cases where the contract of resale is made abroad, and yet the manufacture of the goods, some negotiation of the terms, and complete execution of the contract take place here under such circumstances that the trade was in truth exercised here. I think that the question is, Where do the operations take place from which the profits in substance arise? To my mind there is no evidence

(1) [1896] A. C. 325, 336.

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in the present case of any other place than Denmark. No doubt operations of importance take place here, orders are solicited, and the successful adapting of the goods bought for the purposes of the buyers' business is supervised here. But in the words of Lord Watson in the case cited (1): "There may, in my opinion, be transactions by or on behalf of a foreign merchant in this country so intimately connected with his business abroad that without them it could not be successfully carried on, which are nevertheless insufficient to constitute an exercise of his trade here within the meaning of Sch. D," and he instances the case of the purchase of goods here for the purpose of sale abroad: *Sulley* v. *Attorney-General* (2), a case to which I shall have to refer on the second point. In the words of Lord Herschell (3): "What is done there," that is, in soliciting orders, "is only ancillary to the exercise of his trade in the country where he buys or makes, stores, and sells his goods." On this part of the case I think that the learned judge came to the right conclusion in law.

But an alternative contention of great importance was advanced by the Attorney-General. He relied on s. 41, sub-s. 2, of the Finance (No. 2) Act of 1915, which has been read by the Master of the Rolls. In this case, he says the office conducted in the name of the respondents by Mr. Robinson was, though not an agency, a branch, and the profits arose indirectly through it: hence the respondents are chargeable in the name of the branch. It cannot be doubted that such a contention if sound makes grave changes in income tax law as it existed up to the date of the Act. "The Income Tax Acts, however, themselves impose a territorial limit; either that from which the taxable income is derived must be situate in the United Kingdom or the person whose income is to be taxed must be resident there": see per Lord Herschell in *Colquhoun* v. *Brooks*. (4) One of the early cases on the Income Tax Act, *Sulley* v. *Attorney-General* (2), in 1860, was a case where a New York firm of merchants had a partner resident in this country with an office and staff of employés at Nottingham engaged on the business of the firm,

(1) [1896] A. C. 340.
(2) 5 H. & N. 711.
(3) [1896] A. C. 325, 336.
(4) (1889) 14 App. Cas. 493, 504.

who bought goods here and despatched them to New York for sale by the firm there. The special verdict found (1) that the firm had a place of business in Nottingham, which was occupied by the defendant, the resident partner, and by clerks employed by him on behalf of the partnership, for the purpose of carrying on the business of the partnership in England. It is immaterial whether this organization would be an "agency" or a "branch." Cockburn C.J. calls it "a branch establishment." It would clearly come within s. 41, sub-s. 2. The decision in that case was that there was no trade exercised in this country from which taxable profits arose. Since that date it is common knowledge that British and foreign firms of merchants having their principal places of business abroad have established in this country agencies and branches for the purpose of buying products of the United Kingdom and shipping them to their houses abroad. This section would sweep away the whole of the protection hitherto afforded such firms and would make them chargeable with a tax on all profits made from the sale of such goods. It is true that there is a further sub-section, sub-s. 7, the precise meaning of which no one in the course of the argument was prepared to state, which might be said to be intended to meet the difficulty put. But giving the full effect to sub-s. 7, sub-s. 2 still would have remarkable results. A French firm of motor-car manufacturers have an agency here. The agent gives to an English resident visiting Paris an introduction to the Paris house, as the direct result of which the Paris house in Paris agree to sell and do sell and deliver in France to the purchaser a French motor-car. It can hardly be suggested that it would not be a serious breach of hitherto recognized legal principles to tax in England the French firm on such profits.

Personally I cannot read the sub-section as a charging section at all. It is plain that in any view of it the words have to be cut down. They do not limit the words "branch factorship agency receivership or management" to a branch, etc., in this country, nor state that the branch, etc., must be a branch, etc., of or for the resident person, or provide that

(1) (1859) 4 H. & N. 769, 772.

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the profits or gains arising, and so on, are to be the profits and gains of the non-resident person. The sub-section has to be read in close connection with s. 41 of the Income Tax Act, 1842, which has been amended by the previous sub-section. So read, the omissions I have referred to are filled up and the sub-section assumes its proper place as part of the provision made for assessing and collecting the duties charged under the charging sections which incorporate Schs. A to E. In other words, the non-resident person is still only charged on profits "situate within the United Kingdom" and the profits or gains referred to in the sub-section must be taken to be so qualified, following the principle adopted by Lord Herschell in *Colquhoun* v. *Brooks* (1), which I have already cited. Even if the sub-section added nothing to the effect of sub-s. 1, I should have thought it more likely to be redundant than revolutionary; but it seems at any rate to have the effect of making the profits or gains arising through a branch, etc., chargeable only in the name of that branch, a result which would not appear to follow from s. 41 amended by sub-s. 1 alone.

I think that this construction of the section is confirmed by reference to the Income Tax Act, 1918, where the corresponding words are enacted as the sixth of the General Rules applicable to Schs. A, B, C, D, and E, the charge on the non-resident person under Sch. D being still expressed in the old form of words in respect of profits or gains arising from any trade exercised within the United Kingdom.

I entirely agree with the view expressed by Rowlatt J. on this part of the case.

I agree that this appeal should be dismissed with costs.

LORD STERNDALE M.R. Younger L.J. has asked me to say that he agrees with these judgments.

Appeal dismissed.

Solicitor for Crown: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Wainwright, Pollock & Co*

(1) 14 App. Cas. 493, 504.

W. I. C.

[IN THE COURT OF APPEAL.]

C. A.
1921
May 26, 27.

VULCAN MOTOR AND ENGINEERING COMPANY (1906) LIMITED *v.* HAMPSON.

[1919. T. 1344.]

[LIVERPOOL DISTRICT REGISTRY.]

Company—Salary of Employee—Commission on "profit earned by the company" —Net Profits—Deduction of Excess Profits Duty—Finance (No. 2) Act, 1915 (5 *& 6 Geo.* 5, *c.* 89), *ss.* 38, 40, 45, *sub-s.* 3.

By an agreement made in 1912 the defendant was appointed works manager of the business of the plaintiff company at a salary, and in addition he was to be paid a commission equal to 50*l.* for every 5 per cent. "profit earned by the company" (or fraction of 5 per cent. pro rata) after 10 per cent. had been earned by the company :—

Held, that the words "profit earned by the company" meant profits divisible among the shareholders, in other words "net profits," and upon the authority of the decision of the Court of Appeal in *Patent Castings Syndicate* v. *Etherington* [1919] 2 Ch. 254, that in arriving at the fund upon which commission was payable excess profits duty must first be deducted.

Hollins & Co. v. *Paget* [1917] 1 Ch. 187 overruled.

APPEAL from the judgment of Acton J. at the trial of the action without a jury.

The plaintiffs were a motor engineering company, and the defendant was at all material times works manager of the plaintiff company. In an action by the plaintiffs against the defendant (as to which no question was raised on the appeal) the defendant counterclaimed for commission due under his agreement with the plaintiffs. By the agreement, made in 1912, the defendant was appointed works manager of the business of the plaintiff company at a salary of 550*l.* per annum and a commission equal to one-half of the commission payable to Thomas Hampson (the defendant's brother) the managing director of the company. Clause 5 of the agreement between the plaintiff company and Thomas Hampson (which was made on August 24, 1912) was as follows : "The company shall pay to the said Thomas Hampson a salary of 1200*l.* per annum by equal monthly payments on the first of each

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calendar month and in addition shall pay to him annually a commission equal to 100*l.* for every five per cent. profit earned by the company (or fraction of five per cent. pro rata) after ten per cent. has been earned by the company."

The defendant contended that the commission due to him was payable on the amount of the profits earned by the company before deducting excess profits duty. The plaintiffs contended that excess profits duty must be deducted before calculating the amount of the commission.

Acton J. held himself bound by the decision of Eve J. in *Hollins & Co.* v. *Paget* (1), which was, in his opinion, approved by the Court of Appeal in *Patent Castings Syndicate* v. *Etherington* (2), to hold that the defendant's commission was payable on the profits earned by the company before deducting excess profits duty. He accordingly gave judgment for the defendant on his counterclaim for 2540*l.* in respect of commission.

The plaintiffs appealed.

A. R. Kennedy K.C. and *W. Procter* (*C. J. Mathew K.C.* with them) for the plaintiffs. The words "profit earned by the company" mean net profit. In Lindley on Partnership, 8th ed., pp. 40, 41, it is said: "Profits (or net profits) are the excess of returns over advances; the excess of what is obtained over the cost of obtaining it. Losses, on the other hand, are the excess of advances over returns; the excess of the cost of obtaining over what is obtained. Profits and net profits are for all legal purposes synonymous expressions; but the returns themselves are often called gross profits; hence it becomes necessary to call profits net profits in order to avoid confusion. In the present treatise, however, the word 'profits' will be used in the sense of net profits; and the expression 'gross profits' will be avoided as much as possible"; and in a note *In re Spanish Prospecting Co.* (3) is referred to for a discussion of the meaning of the word "profits." Therefore "profits" has the same meaning as

(1) [1917] 1 Ch. 187. (2) [1919] 2 Ch. 254.
(3) [1911] 1 Ch. 92.

"net profits." In *Patent Castings Syndicate* v. *Etherington* (1) the Court of Appeal held that in an agreement to pay commission on the "net profits" of a business the expression "net profits" meant the fund which could lawfully be applied in the payment of a dividend, and that that fund could only be arrived at after deducting excess profits duty, which by s. 45, sub-s. 3, of the Finance (No. 2) Act, 1915, was a debt due from the company to the Crown. The words of the agreement in the present case, "profit earned by the company," mean "net profit," that is, the sum which can lawfully be applied in the payment of a dividend to the shareholders, and therefore the amount must be arrived at after deducting excess profits duty. Upon this construction of the agreement, the case comes within the decision in *Patent Castings Syndicate* v. *Etherington* (1), and that decision is binding on this Court. The decision of Eve J. in *Hollins & Co.* v. *Paget* (2) is wrong and ought to be overruled. In that case the manager's commission was payable on the excess of "the profits of the company made during the financial year" after allowing a sum sufficient to pay a dividend of 7 per cent. per annum on the ordinary capital of the company, and Eve J. held that excess profits duty ought not to be deducted before ascertaining the excess profits on which the manager's commission was to be payable. "Profits made" cannot be distinguished from "profits earned," and mean net profits divisible among the shareholders. That decision was not, as Acton J. thought, approved by this Court in *Etherington's Case.* (1) The Court merely said that the decision might be justified by the particular facts, and that it might well be that the decision could stand with the judgment in *Etherington's Case.* (1)

[Finance Act, 1916 (6 & 7 Geo. 5, c. 24), s. 49; and *Thompson & Co.* v. *Amis* (3) were also referred to.]

D. M. Hogg K.C. and *Wingate-Saul K.C.* (*J. E. Singleton* with them) for the defendant. The question depends upon the meaning of clause 5 of the manager's agreement. If the expression "profit earned by the company" means

(1) [1919] 2 Ch. 254. (2) [1917] 1 Ch. 187.
(3) [1917] 2 Ch. 211, 223.

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profits divisible among the shareholders, it is admitted that excess profits duty must first be deducted. But it is submitted that that is not the true meaning. The expression "excess profits duty" presupposes a payment out of profits. There can be no excess profits duty unless profits have been earned. The profits have been "earned" by the company, and part of those profits go to the Crown. The expense of earning those profits must be deducted. That is the true position. Income tax is also made "a debt due to the Crown": s. 169 of the Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), but it is part of the profits: *Ashton Gas Co.* v. *Attorney-General.* (1) Both income tax and excess profits duty are made debts due to the Crown solely for the purposes of collection. Excess profits duty is part of the profits earned by the company though not divisible among the shareholders. "A proportionate part of the profits payable to the Revenue is not a deduction before arriving at, but a part of, the profits themselves": per Buckley J. in *Attorney-General* v. *Ashton Gas Co.* (2), whose judgment was affirmed in the House of Lords. (1) This passage was cited with approval by Sargant J. in *Johnston* v. *Chestergate Hat Co.* (3) The decision of Eve J. in *Hollins & Co.* v. *Paget* (4) was right and is in point, and it was recognized as good law in *Patent Castings Syndicate* v. *Etherington.* (5)

[*Robbins* v. *Inland Revenue Commissioners* (6) was also referred to.]

No reply was called for.

BANKES L.J. This appeal raises the question whether excess profits duty should be deducted from the profits of the plaintiff company before assessing the amount of the commission payable to the defendant. The defendant was, with his brother, Thomas Hampson, employed by the plaintiff company. The brother was appointed managing director of the company under an agreement in writing dated

(1) [1906] A. C. 10.
(2) [1904] 2 Ch. 621, 624.
(3) [1915] 2 Ch. 338, 343.
(4) [1917] 1 Ch. 187.
(5) [1919] 2 Ch. 254.
(6) [1920] 2 K. B. 677.

August 24, 1912. The defendant was employed as works manager of the company at a salary of 550*l.* per annum and one half of the commission payable to his brother, the managing director. The commission payable to Thomas Hampson is set out in clause 5 of his agreement with the company. [The Lord Justice read the clause.] Acton J. decided in favour of the defendant, following the decision of Eve J. in *Hollins & Co.* v. *Paget* (1), a decision which he thought had been referred to in terms of approval by the Court of Appeal in *Patent Castings Syndicate* v. *Etherington.* (2) In these circumstances he felt himself bound to follow Eve J.'s view and decide that excess profits duty ought not to be deducted before arriving at the amount of profit on which the commission payable to the defendant was based.

In my opinion the question depends upon the true construction of clause 5 of the managing director's agreement, because, if upon its true construction it refers to the profits of the company divisible amongst the shareholders, then this Court is bound by its former decision in *Etherington's Case* (2) that excess profits duty is to be first deducted. In *Etherington's Case* (2) the language of the agreement was that the works manager was to be paid by way of commission a percentage upon the "net profits" for the year, and it was held that the "net profits" of the business for the year were the excess of the receipts for the year over the current expenses and outgoings of the same year, and as matter of law that that fund could only be arrived at after deducting excess profits duty, which was a debt of the company to the Crown. If, therefore, upon the true construction of the managing director's agreement in the present case he was to be paid his commission upon the net profits of the company, then we are bound by the decision of this Court in *Etherington's Case.* (2)

It has been pointed out that a confusion often arises from the use of the words "gross profits," that no meaning is properly attributable to that expression; and that to avoid confusion and difficulty it is better not to use the expression

(1) [1917] 1 Ch. 187. (2) [1919] 2 Ch. 254.

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"gross profits," but to use the word "returns" as contrasted with "net profits." In my opinion what these parties in 1912 were contracting about were the profits of the company divisible amongst the shareholders. It is true they have used the words "profit earned by the company," but that expression "earned by the company" is not capable of precise definition. It appears to me to be only a compendious way of expressing the amount available for distribution amongst the shareholders, a proportion of which amount would be payable to the managing director for his services. Mr. Hogg has sought to draw a distinction between profits divisible amongst shareholders and profits earned by the company; and he says that the company must earn profits before any excess profits duty becomes payable, and that therefore, the "profit earned by the company" must include the amount which is payable as excess profits duty. That is very true, and I think that it is an argument which might possibly prevail in reference to language used by parties in an agreement made after the coming into operation of the Finance (No. 2) Act, 1915; but we have to endeavour to ascertain in what sense the parties, who made this agreement in the year 1912, used the expression "profit earned by the company." I cannot see any reason for supposing that they were contracting about anything except the amount of profit divisible amongst the shareholders, in other words, the net profits of the company. For these reasons in my opinion, upon the construction I place upon this agreement, I am unable to distinguish it from that in *Etherington's Case* (1), and therefore the appeal must be allowed.

As to *Hollins & Co.* v. *Paget* (2), it is not absolutely necessary to express any final opinion upon it, because the language of the agreement there is not identical with the language of the agreement here. But I think I ought to say that I cannot draw any distinction between the construction of the agreement in that case and in this. I do not think it possible to draw a distinction between "profits made" and "profits earned," and therefore the decision

(1) [1919] 2 Ch. 254. (2) [1917] 1 Ch. 187.

of Eve J. in that case cannot stand, upon the ground that the construction which he put upon that agreement is not, in my opinion, the correct one. For these reasons the appeal must be allowed.

WARRINGTON L.J. I am of the same opinion. The question we have to decide is what is the true construction of a clause in the agreement between the company and the defendant's brother, which regulates the commission payable by the company to the defendant. That clause as altered so as to make it applicable to the defendant is in these terms: The company shall pay to the said Joseph Hampson a salary of 550*l.* per annum and in addition shall pay him annually a commission equal to 50*l.* for every 5 per cent. "profit earned by the company" (or fraction of 5 per cent. pro rata) after 10 per cent. has been earned by the company. The question is, Do the words "profit earned by the company" in that agreement mean the profits which are divisible amongst the shareholders, or do they mean the entire profits of the company including that proportion which is not divisible amongst the shareholders but is payable to the Crown under the name of excess profits duty? In my opinion upon the construction of the agreement the expression "profit earned by the company" in this agreement means the profits divisible amongst the shareholders, and I say so for this reason. The agreement is curiously worded but it obviously means this: That 10 per cent. shall first be paid, subject to the discretion of the directors, among those who are entitled to the profits, and then for every further 5 per cent. of the same divisible profits there shall be paid to the works manager a commission of 50*l.* I think that it is a clause dealing with the apportionment of the profits of the company between the shareholders, who but for this agreement would be entitled to the whole of those profits, and the works manager. If that is so, the present case is entirely covered by the decision in *Patent Castings Syndicate* v. *Etherington*. (1) In that case the expression used was "net profits," but the net

(1) [1919] 2 Ch. 254.

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profits were held there to be the amount of the profits divisible amongst the shareholders. If therefore I am right in saying that according to the true construction of this agreement the profit earned is the profit divisible amongst the shareholders, then this case is exactly covered by *Etherington's Case* (1), and I think it is so covered.

It is necessary to say a word about *Hollins & Co.* v. *Paget* (2), a decision which the learned judge felt bound to follow. In *Etherington's Case* (1) that case was cited. The words in the agreement in *Hollins's Case* (2) were not those used in the agreement with which the Court then had to deal, and in giving judgment the several judges who took part in it avoided overruling the decision of Eve J., by pointing out that the agreement with which they were dealing and the agreement with which he was dealing were differently worded, and therefore their decision did not necessarily overrule his decision. Speaking for myself, if I had then had the advantage of the argument which we have had to-day, and if in particular I had been referred to the passages which have been referred to here to-day from Lindley on Partnership in reference to the words "profits," "net profits," and "gross profits," I should not have been prepared to give even the qualified approval of the judgment of Eve J. which I gave in that case. I think now, after the further argument we have had, that that case must be taken to have been overruled by *Etherington's Case* (1) and by the present case.

SCRUTTON L.J. The exact point in this case is whether the servant of a company, who is to be paid annually a commission equal to 50*l.* for every 5 per cent. profit earned by the company after 10 per cent. has been earned by the company, is entitled to receive his commission on the profits of the company after or before deduction of excess profits duty. He says he is entitled to commission on these profits before excess profits duty is deducted; the company say that they are entitled to deduct excess profits duty and pay him commission on the balance.

(1) [1919] 2 Ch. 254. (2) [1917] 1 Ch. 187.

I desire to say at once that, but for the decision of this Court in *Etherington's Case* (1), I should have desired to take time to consider what seems to me to be a question of very considerable difficulty, and to consider the exact relation both of income tax and of excess profits duty to clauses of this description. But I have a decision of this Court, binding on me, that where the commission is to be paid on net profits, which the Court says are equivalent to profits divisible among the shareholders though not necessarily divided, though the income tax is not to be deducted, excess profits duty is. It is therefore not profitable for me to speculate what decision I should have come to if I had not had the guidance of that decision. If clause 5 of this agreement means that the commission is to be on profits divisible among the shareholders, I am bound by the decision in *Etherington's Case.* (1)

Now " net profits " does not seem to me a very satisfactory expression, because it contrasts with " gross profits " which appears to me to be a meaningless expression. One may speak of receipts or turnover without deducting the expenses of earning them, but it appears to me meaningless to describe receipts as profits without taking into account the expenses of earning the receipts. When therefore clause 5 speaks of " profit earned by the company," in my view it means profits earned by the company after deducting the expenses of earning them, which is substantially the same as the expression " net profits " in *Etherington's Case.* (1) If so, I have the decision of this Court that the company in calculating the commission is entitled to deduct the excess profits duty.

If I may respectfully say so, I sympathize with Acton J., because he had before him a decision of the Court of Appeal in which the decision of Eve J. in *Hollins & Co.* v. *Paget* (2) was referred to where commission was payable on " profits made " by the company. He found one member of the Court saying (3) : " I think it may well be that that decision could stand with our present judgment. I am not sure, with all respect to my learned brother, that I quite agree with some

(1) [1919] 2 Ch. 254. (2) [1917] 1 Ch. 187.
(3) [1919] 2 Ch. 270.

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Scrutton L.J.

of the remarks that he made in the course of his judgment." He found another member of the Court saying (1): "My respectful view with regard to" that decision is that it "can be justified by the particular facts of the case." And he found Eve J., who was then sitting in the Court of Appeal, saying (2): "I am not prepared to say that each of the other cases to which our attention has been directed . . . . cannot be supported on the construction of the particular agreements . . . . but I agree that there are expressions . . . . in *Hollins & Co.* v. *Paget* (3) which require re-consideration." The learned judge below took the view that the Court of Appeal had approved the decision in *Hollins's Case* (3), though I think it is clear from the expressions that I have read that it was an approval of a very limited and temporary character. But like my brother Warrington, who took part in that judgment, having listened to the argument in this case I find it difficult to see how the decision of Eve J. can stand and be supported after the decision in *Etherington's Case* (4), and I think that the learned judge below was inaccurate in thinking that there was an approval of Eve J.'s judgment which required him to follow it. "Profits" mean profits after deducting the expenses of earning them, and the decision in *Etherington's Case* (4) binds one to say that one of the expenses of earning them is the payment of excess profits duty. For these reasons I think that the judgment below should be reversed.

Appeal allowed.

Solicitors for plaintiffs: *Sharpe, Pritchard & Co., for Richardson, Marsh & Hopwood, Liverpool.*

Solicitors for defendant: *W. W. Wynne & Sons, for Mawdsley & Hadfield, Southport.*

(1) [1919] 2 Ch. 274.
(2) Ibid. 275.
(3) [1917] 1 Ch. 187.
(4) [1919] 2 Ch. 254.

W. F. B.

ATTORNEY-GENERAL *v.* COOLE AND OTHERS.

1921
June 29, 30.

Revenue—Estate Duty—Property passing on Death—Benefit accruing from Cesser of Interest—Annual Sum payable out of Part of Residue in Trust for Son until of Age—"Property in which the deceased . . . . had an interest ceasing on the death of the deceased"—Value of Benefit accruing through Death—"Principal value"—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*b*); *s.* 7, *sub-s.* 7 (*b*).

By s. 1 of the Finance Act, 1894, estate duty is payable "upon the principal value . . . . of all property . . . . which passes on the death" of any person.

By s. 2, sub-s. 1: "Property passing on the death of the deceased shall be deemed to include the property following, that is to say . . . . (*b*) Property in which the deceased . . . . had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest. . . . ."

By s. 7, sub-s. 7: "The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall . . . . (*b*) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended."

A testator left his estate to trustees on trust as to the income of four-fifths thereof to pay 500*l.* a year to his wife for the maintenance of their son until he should be twenty-one. Eighteen months after the death of the testator the son died, about eighteen months before attaining twenty-one years. The widow duly applied the 500*l.* a year to his maintenance from the death of the testator to that of the son:—

Held, that the son had an interest ceasing on his death in the above four-fifths to the extent of 500*l.* a year within the meaning of s. 2, sub-s. 1 (*b*), and that by the cesser of that interest a benefit accrued to the four-fifths part the principal value of which, calculated in accordance with s. 7, sub-s. 7 (*b*), was the sum which at the rate of interest earned by the rest of the estate would produce 500*l.* a year.

Held, also, that the 500*l.* a year was an annuity and not a legacy.

Attorney-General v. *Power* [1906] 2 I. R. 272 distinguished.

INFORMATION by the Attorney-General.

By his will dated January 26, 1915, Arthur Cook Coole (called herein "the testator"), after making certain pecuniary bequests, devised and bequeathed all the real and personal estate of which he should die possessed to trustees upon trust to realize and pay thereout certain funeral and other expenses and certain legacies, and proceeded as follows: "And after such payments and as regards the residue of my estate as to four-fifths part thereof to invest the same

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upon such securities as trustees are allowed by law to invest trust moneys. And as to the net moneys to arise therefrom to pay thereout to my wife Sarah Harriet Coole the sum of five hundred pounds per annum by equal quarterly or half-yearly payments for the maintenance education clothing and otherwise of my son Arthur Evans Coole during the time he shall be under the age of twenty-one years. And to accumulate and invest any surplus income during the time my said son shall be under that age of twenty-one years and on his attaining the said age of twenty-one years" a further disposition.

The testator died on December 20, 1917, and the will was duly proved. Arthur Evans Coole, the son, died on May 14, 1919, an infant, without leaving lawful issue.

The sum of 500*l.* payable under the trusts of the will was duly paid to the defendant Sarah Harriet Coole as from the death of the testator to the death of the son and duly applied by her for his benefit as directed by the will. Upon the death of the son it was alleged in the information that estate duty became payable under s. 2, sub-s. 1 (*b*), of the Finance Act, 1894 (1), in respect of the benefit which accrued to four-fifths of the residuary estate of the testator by the cesser of this payment, and that by virtue of s. 7, sub-s. 7 (*b*) (1), the value of the benefit was the principal value of an addition to the above four-fifths equal to the income to which the payment extended subject, so far as the same was payable out of real estate and the income thereof to the reduction allowed under s. 15 of the Finance Act, 1914 (4 & 5 Geo. 5, c. 10), in respect of quick succession.

(1) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2, sub-s. 1: "Property passing on the death of the deceased shall be deemed to include the property following, that is to say: . . . . (*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest. . . . ."

Sect. 7, sub-s. 7: "The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall— . . . . (*b*) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended."

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The prayer was that duty might be declared to be payable, and that the value of the benefit was such a sum as bore the same proportion to the value (as at the death of the son) of four-fifths of the testator's residuary estate, as the 500*l.* bore to the net annual income of the same four-fifths free from incumbrances.

By their answer Sarah Harriet Coole and two others, executors and trustees of the above will, denied liability, and alternatively disputed the basis on which they were liable. (1)

Sir E. Pollock S.-G. and *Sheldon* for the informant. The question is whether the son had an interest in the four-fifths of the residue estate to the extent of the payment ceasing at his death, and if so, whether estate duty is payable and on what basis. The words of s. 2, sub-s. 2 (*b*), of the Finance Act, 1894, are: "Property in which the deceased . . . . had an interest ceasing on the death of the deceased." The payment was enjoyed by him, although not paid directly to him. In *In re Morgan* (2), where property was held by trustees in trust to pay the rents, etc., to the testator's widow for the maintenance of their son until he should be of age, it was held that the latter had all the powers of a tenant for life under s. 58, sub-s. 1 (ii), of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), which gave such powers to persons whose "estate or interest" was in possession. The Court, therefore, in that case held that the infant had an interest in the property, and "interest" has the same meaning in the Finance Act, 1894, as in the Act of 1882. And the son also had an interest in the four-fifths of the estate as the source from which the payment flowed: *Attorney-General* v. *Watson.* (3) Although in *In re Morgan* (2) there was an express term in the will that the mother was not to be liable to account either to the trustees or to her son, a provision which does not appear in the present will, that circumstance is immaterial:

(1) On the basis of a liability on the sum of 820*l.* 4*s.* they paid 30*l.* into Court; but it was admitted at the hearing that there was no power to pay money into Court.

(2) (1883) 24 Ch. D. 114.

(3) [1917] 2 K. B. 427.

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Hadow v. *Hadow* (1); *Browne* v. *Paull.* (2) The interest of the son did not pass on his decease under s. 1 of the Act of 1894, being a limited interest ceasing at twenty-one: per Lord Macnaghten in *Earl Cowley* v. *Inland Revenue Commissioners* (3); but it was deemed to pass under s. 2, sub-s. 1 (*b*), to the extent of the benefit accruing by the death, not to the owner of the estate, but to the estate. This subsection was intended to embrace those cases in which, looking at the property both before and after the death, it is found that, by reason of the death, there has been an accretion or benefit to its value.

[*Inland Revenue* v. *Maclachlan* (4) was also referred to.]

Attorney-General v. *Power* (5) is distinguishable, in that the deceased had no definite interest in possession in the whole property; the trustees had a discretion as to the amount they could devote to the infant's maintenance.

There being a cesser of the interest of the deceased in the four-fifths to the extent of the payment within the meaning of s. 2, sub-s. 1 (*b*), the value of the benefit which thereby accrued to the four-fifths must be calculated according to s. 7, sub-s. 7 (*b*) (6), and is the amount by which the four-fifths is enhanced—namely, the capital sum which at the rate of interest earned by the rest of the estate would produce 500*l.* per annum. The fact that that would be more than the actual benefit to the property is immaterial: see *Attorney-General* v. *Watson.* (7)

[*Lord Advocate* v. *Henderson's Trustees* (8) was also referred to.]

Hughes K.C. and *Arnold Jolly* for the respondents. Arthur Evans Coole had no interest in the 500*l.*; the interest was in his mother: see *Hadow* v. *Hadow* (1) and *Browne* v. *Paull.* (2) *In re Morgan* (9) was decided under a different statute, and was a decision on real property law, and "interest" under the Act then in question has not the same meaning as

(1) (1838) 9 Sim. 438.
(2) (1850) 1 Sim. (N. S.) 92.
(3) [1899] A. C. 198, 212.
(4) (1899) 36 S. L. R. 727.
(5) [1906] 2 I. R. 272.
(6) See note (1) ante, p. 608.
(7) [1917] 2 K. B. 427.
(8) (1905) 42 S. L. R. 720.
(9) 24 Ch. D. 114.

"interest" in the Act of 1894: see per Palles C.B. in *Attorney-General* v. *Power*. (1) Moreover, the case was not contested, as all the parties desired the decision that was ultimately given. In any event the son only had an interest in possession in 820*l*., balance of the maximum sum which would have been payable to him had he lived, and which was in the hands of the trustees. The estate could not benefit to a greater extent than the above-mentioned 820*l*. The word "principal" in s. 7, sub-s. 7 (*b*), is not necessarily applicable to every case, and is not so here. In the ordinary case of a life annuity it would be capitalised at twenty years' purchase, or there would be an actuarial valuation, but the principal value required to provide a future payment of 820*l*. cannot be more than 820*l*. "Equal" in s. 7, sub-s. 7 (*b*), means "sufficient to provide for." The Crown contends that the principal value is a sum bearing the same proportion to the total value of the four-fifths as the 500*l*. bears to the total income therefrom, and they must say that this would have held good even had the son died one day before attaining the age of twenty-one. This is a reductio ad absurdum.

This was really a bequest of 1500*l*. payable in six half-yearly instalments, or a succession of legacies, and not an annuity at all.

Sheldon in reply. In *Scholefield* v. *Redfern* (2) it was held that an annual payment under a will for a limited period of five years was an annuity and not a series of legacies.

SANKEY J. In this case the Attorney-General claims that estate duty is payable upon the death of a young man named Arthur Evans Coole, and the question which falls for determination raises some difficult questions of law under ss. 1, 2 and 7 of the Finance Act, 1894.

The facts are these. Arthur Evans Coole was born on December 31, 1899, and unfortunately died on May 14, 1919, an infant, without leaving lawful issue. His father, Arthur

(1) [1906] 2 I. R. 272, 279. (2) (1863) 2 Dr. & Sm. 173.

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Cook Coole, had made a will, and died on December 20, 1917. Therefore the son died about eighteen months after his father's death, and about eighteen months before attaining his majority. The defendants are the executors of the father's will, which provided, after directing certain payments, "And after such payments and as regards the residue of my estate as to four-fifths part thereof to invest the same upon such securities as trustees are allowed by law to invest trust moneys. And as to the net moneys to arise therefrom to pay thereout to my wife Sarah Harriet Coole the sum of five hundred pounds per annum by equal quarterly or half-yearly payments for the maintenance education clothing and otherwise of my son Arthur Evans Coole during the time he shall be under the age of twenty-one years. And to accumulate and invest any surplus income during the time my said son shall be under that age of twenty-one years"; and then, on his attaining that age, certain other dispositions.

Under these circumstances the Crown say that upon the death of the son estate duty became payable in respect of the benefit which accrued as to the four-fifths of the residuary estate, by the cesser of the above annuity, and that it is to be calculated in the way provided by s. 7, sub-s. 7 (*b*) (1), of the Act.

Turning to the Act, s. 1 is the charging section, and s. 2, with which I shall deal in greater detail later, provides. [His Lordship read it. (1)] It is the contention of the Crown that when the son died there was a cesser of an interest in possession which he had in the property. They say that s. 5, sub-s. 3, which provides that "In the case of settled property, where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations under the settlement continue to subsist, the property shall not be deemed to pass on his death," does not apply, because the interest which the son had was an interest in possession; and if they are right they say that the way in which the benefit "accrues or arises by the cesser of such interest"

(1) See note (1) ante, p. 608.

is to be calculated as provided by s. 7, sub-s. 7 (*b*), which enacts. [His Lordship read it. (1)]

Those being the contentions of the Crown the answer made by the respondents is as follows: They say, firstly, "The said Arthur Evans Coole had no interest in the said four-fifths of the said residuary estate except a contingent interest which failed or determined by reason of his death before it became an interest in possession within the meaning of s. 5, sub-s. 3, of the Finance Act, 1894." They say, secondly, that the expression "interest ceasing on the death of the deceased" in ss. 2 and 7 of the Finance Act, 1894, means an interest for life or some other indefinite period, and they say, thirdly, that in the alternative the duty ought to be calculated in a way set out therein. It suffices to say as to the third ground, that the defendants allege that under the will the most that this young man could have got would have been that he would have had 500*l.* applied for his maintenance, etc., in each year from the time his father died, on December 20, 1917, to the time when he would have attained his majority on December 31, 1920. That is about three years, and the sum amounts to 1513*l.* 4*s.* Of that, they say, part was actually paid, leaving a balance of 820*l.* 4*s.* Therefore, they say, the only interest that could pass was one of 820*l.* 4*s.*, the amount that would have been paid had the son attained his majority.

Leaving for a moment the somewhat involved sections of the Act the question to be determined may be stated very shortly. Was the property in question property in which the deceased had an interest ceasing on the death of the deceased? Because if this property is within s. 2, sub-s. 1 (*b*), I think that it almost follows—though not quite—that the way in which the benefit is to be calculated is that provided in s. 7, sub-s. 7 (*b*). Therefore I propose first to address myself to the question: Had the son an interest which at the time of his death was an interest in possession?

Sections 1 and 2 of the Finance Act, 1894, have been explained as clearly as it is possible to explain them by

(1) See note (1) ante, p. 608.

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Lord Macnaghten in *Earl Cowley* v. *Inland Revenue Commissioners*, where he says (1): "Now, if the case falls within s. 1 it cannot also come within s. 2. The two sections are mutually exclusive. Section 1 might properly, I think, be headed, 'With regard to property passing on death, be it enacted as follows.'" And he goes on to say (2): "On reading the Act I think this is made tolerably clear not only by the opening sentence of s. 2, sub-s. 1 (3), but also by the directions for valuing 'the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased' in s. 7, sub-s. 7. If property passes you can put a value on it by considering what it would fetch in the open market. You must resort to other means in order to estimate the value of property deemed to pass when an interest ceases."

Now without using language which is rigorously accurate I think it may be stated that s. 1 refers to an actual state of things, while s. 2 refers to a hypothetical state of things; because whereas s. 1 says "In the case of every person dying after the commencement of this part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death," which is an actual state of things, s. 2 sweeps into s. 1, the charging section, property which, although it does not actually pass, shall be deemed to pass on the death of the deceased. [His Lordship read s. 2, sub-s. 1 (*b*). (3)] An interest which arises on the death of a deceased cannot really pass, but by the effect of this section, it is deemed to pass to the extent to which a benefit accrued or arose by the cesser of such interest. Obviously that creates an artificial condition of things, and just as s. 2 creates an artificial condition, so s. 7, sub-s. 7 (3), in its turn creates a somewhat artificial state of things with regard to valuation.

These being the sections of the Act, I turn to the will, which says: "As regards the residue of my estate as to four-fifths part thereof to invest the same upon such securities as

(1) [1899] A. C. 198, 212. (2) Ibid. 213.
(3) See note (1) ante, p. 608.

trustees are allowed by law to invest trust moneys. And as to the net moneys to arise therefrom to pay thereout to my wife Sarah Harriet Coole the sum of 500*l.* per annum by equal quarterly or half-yearly payments for the maintenance education clothing and otherwise of my son Arthur Evans Coole." Does that give the son an interest in possession? Is it property in which the son has an interest ceasing on his death within the meaning of s. 2, sub-s. 1 (*b*)? The respondents say that the son has no interest, because the money is left to the mother to be used by her for the above purposes. Three authorities were cited on this part of the case. First, the case of *In re Morgan*. (1) It is quite true that that case was a case under the Settled Land Act, 1882, s. 58, sub-s. 1 (ii). The facts are set out in the headnote. "Certain estates were devised to the use of the testator's wife and G. T., upon trust to pay the net rents and income of the estates to the wife for the maintenance, education, and benefit of the testator's son until he should attain twenty-one, and without being liable to account to the trustees or to the son for the same; and upon the son's attaining twenty-one, then upon trust for him absolutely; but if he should die under twenty-one without leaving issue, then upon trust to permit the wife to receive such rents and income for her life," and so on. It was held "that the infant son had the powers of a tenant for life, being tenant in fee simple with an executory limitation over in case of dying under twenty-one without issue." Of course that was a decision under a different Act. The Solicitor-General endeavoured to show that although in that case there was an express provision that the wife should not be liable to account to the trustees or to the son, which provision is absent from the present will, that made no difference, because two cases, *Hadow* v. *Hadow* (2) and *Browne* v. *Paull* (3), showed that it was quite immaterial whether, for the purposes of the decision, those words were there or not. I do not understand counsel for the defendants to dispute that, therefore the first point with regard to *In re*

(1) 24 Ch. D. 114.

(2) 9 Sim. 438.

(3) 1 Sim. (N. S.) 92.

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Morgan (1) is that the mere fact that in the will in that case there was a clause that the wife should not be liable to account does not in any way differentiate it from the will before me. How far is *In re Morgan* (1) an authority for saying that A. E. Coole had an interest in possession? It is unfortunate that that case was not argued at length, and that the parties concurred in the arrangement: see Mr. Bousfield's statement (2); but it was the judgment of a very experienced judge, and has stood without any qualification since 1883. North J. said (2): "In my opinion this case does come under s. 58, sub-s. 2. (3) That section first of all contains a provision that 'each person shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act as if each of them were a tenant for life.'" Therefore it was necessary to decide that the young man in *In re Morgan* (1) had an interest in possession within the meaning of s. 58, sub-s. 1 (ii), of the Settled Land Act, 1882, because it was only if he had such an interest that he could have the powers of a tenant for life. Unless I am prepared to say that the word "interest" in s. 2, sub-s. 1 (*b*) (4), of the Finance Act, 1894, is used in a different sense from that in which it is used in s. 58, sub-s. 1 (ii), of the Settled Land Act, 1882, it seems to me that *In re Morgan* (1) is an authority in the present case.

The Solicitor-General then cited *Inland Revenue* v. *Maclachlan* (5), a decision of the Scotch Court of Appeal upon the question of the cesser of an annuity. The headnote, after setting out the sections, states the facts: "The proprietor of an estate burdened it with an annuity of 800*l.* to his widow. A subsequent proprietor burdened it to the extent of a further sum of 800*l.* restrictable during the life of the previous annuitant to the extent of 400*l.*, an additional 400*l.* a year being charged in favour of the second annuitant on certain legacies during the same period: *Held*, that estate duty was payable by the owner of the estate on the

(1) 24 Ch. D. 114.
(2) Ibid. 116.
(3) This should be s. 58, sub-s. 1 (ii).
(4) See note (1) ante, p. 608.
(5) 36 Sc. L. R. 727.

death of the first annuitant on the principal value of the whole income of 800*l.*, although the benefit actually accruing to him only represented an income of 400*l.* in consequence of the increased charge for the second annuitant, on the ground that the proper test was the value of the interest enjoyed by the deceased and not the benefit taken by the successor."

I have read that case rather out of its turn, because it is to some extent an authority with regard to the construction of s. 7, sub-s. 7, and also on the question of the meaning of "annuity." Mr. Jolly in his careful argument on behalf of the respondents contended that the sum left by the will was not really an annuity, but a legacy of 1513*l.* 4*s.*, payable in quarterly instalments, subject to termination. But I think it was in the nature of an annuity.

In *Scholefield* v. *Redfern* (1) the marginal note is, "A gift in a will to trustees of 400*l.* a year each, for their trouble, for five years, described afterwards in a codicil as an annual allowance, is an annuity payable out of income, not a legacy of 400*l.* payable at the end of each year." I do not think it makes any difference that this sum was only liable to be paid for a very short number of years. I am of opinion that it was an annuity, and I come back to the question: Was it a property in which the deceased had an interest? It appears to me that the only case which casts any doubt upon the view of the Crown, and a case which requires to be distinguished, is that of *Attorney-General* v. *Power*. (2) The headnote is as follows: "Where, under a settlement, H. took a vested legal estate as tenant in common in fee, with a limitation over on his dying under twenty-one, subject to a proviso that during his minority trustees were to enter into receipt of the rents, providing thereout for his maintenance, etc., and to accumulate the surplus upon trust, if he should attain his age, for him; but if he should die under age, for the persons who should ultimately become indefeasibly entitled; and H. dying under age, the defendants became indefeasibly entitled as tenants in common in fee of all the

(1) 2 Drew. & Sm. 173. (2) [1906] 2 I. R. 272.

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lands in the settlement, including H.'s share: *Held*, that estate duty was not payable as on a property passing on H.'s death; that H.'s interest had not become a beneficial interest in possession in the lands at his death; and that, accordingly, s. 5, sub-s. 3, of the Finance Act, 1894, was applicable."

Palles C.B. in giving judgment, said (1): "Had, then, Hubert Power [the deceased] an interest, within the meaning of the Act, extending to the entire income of his third? In one sense, he may be said to have had such an interest. One who has a charge of 100*l.* a year, upon an estate of 2000*l.* a year, may be said to have an interest in the entire estate, and in its accruing income; but it is not in that sense that the words 'the income extended to the whole income of the property' are used in s. 7, sub-s. 7. (*a*) In the case I put, the owner of the charge would have an interest, to the extent of 100*l.* a year, and of that only, out of the income of the estate, because that was the sum which he was entitled to be paid out of that income." It seems to me that the Chief Baron is there putting a case which is like the case before me, for he continues: "Now, the cardinal fact here, and that on which I base my judgment, is that Hubert was not entitled to be paid the whole income of the third. The residue, after payment of such sums as should be applied for his maintenance, etc., and prior charges, was to be accumulated, and to be held on trusts under which, not Hubert, but the present defendants, became entitled."

In my view, that distinguishes the case before me from that case. In the present case it was not a cardinal fact that the son was not entitled to be paid the whole income, but only to a part at the discretion of the trustees. I think he was entitled to be paid the fixed sum, and I am of opinion, having regard to *In re Morgan* (2), that the Crown have brought the defendants within the sub-section. I think that this was property in which the son had an interest, and that he had an interest in possession.

That does not end the difficulties in the case, because I have now to consider the meaning of s. 7, sub-s. 7 (*b*), which

(1) [1906] 2 I. R. 278. (2) 24 Ch. D. 114.

gives the greatest possible trouble. It reads [His Lordship read it. (1)] What that means it is extremely difficult to say. I am disposed to think that Mr. Sheldon is right when he says that it refers to an addition to the property of a capital sum which would produce, at the rate of interest earned by the estate, the sum which had ceased. Mr. Jolly for the defendants asked me to construe it as if the value was 820*l.*, the balance of the maximum amount which could in any event have become payable. The difficulty I feel about that contention is that counsel for the defendants are entirely unable to give any meaning to the words "the principal value" in s. 7, sub-s. 7 (*b*) (1), and they are bound to admit that the word "principal" might as well be left out. I am of opinion that that is an impossible way to read the section, because it leaves out what appears to me the chief word in it—namely, "principal." In one way this case is concluded by authority, because very similar circumstances came before Lush J. in *Attorney-General* v. *Watson*. (2) After setting out the sections the headnote continues: "By his will a testator bequeathed an annuity of 1000*l.* per annum to be paid out of his residuary estate, and primarily out of the income thereof, during the life of the annuitant or such less period as in the will mentioned: *Held*, that the annuitant had an interest in the testator's residuary estate within the meaning of the above sections, and that upon the annuitant's death estate duty became payable in respect of the benefit which accrued to the residuary estate upon the death of the annuitant by the cesser of the annuity." *Attorney-General* v. *Watson* (2) is a clear decision that an annuity properly so-called comes within the sections. But Mr. Hughes says that the 500*l.* a year in the present case is something different from an annuity, and is a sum payable over a period of three years, and that the words interest ceasing on the death of the deceased" in ss. 2 and 7 (1) mean interest for life or some other indefinite period. I do not think they do. To begin with, the Act itself does not say so, although in certain circumstances such an interpretation might be very reasonable,

(1) See note (1) ante, p. 608. (2) [1917] 2 K. B. 427.

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and if the Crown succeed here the result may be hard. But the case would be quite different in a case where the annuitant instead of dying three years before the time when the annuity was to terminate, died twenty years before. There the position would be more appropriately treated as one of an annuity. Although the present position can be less appropriately so treated I do not think I can give an interpretation to the sub-section different from what seems to me to be the plain meaning of the words thereof. Once I have decided that this is an interest in possession, then I do not think I can say that the word "interest" has the restricted meaning Mr. Hughes seeks to place on it.

In the result, although it is rather a hard case, I think the Crown are entitled to succeed. The order I make is this: That upon the death of Arthur Evans Coole estate duty became payable in respect of the benefit which accrued or arose upon his death to four-fifths of the testator's residuary trust estate by the cesser of the said annuity. I also declare that the value of the said benefit is such a sum as bears the same proportion to the value as at the death of the said Arthur Evans Coole of four-fifths of the testator's residuary trust estate as the said annuity bears to the net annual income of the same four-fifths free from incumbrances. There will be the other ordinary and usual declarations.

Judgment for Crown.

Solicitor for informant: *Solicitor of Inland Revenue.*
Solicitors for respondents: *H. H. Wells & Sons.*

W. L. L. B.

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July 12.

Cinematograph — Licence — Conditional Licence — Condition ultra vires — Licensing Authority—Delegation of Powers—No Film to be shown unless certified by British Board of Film Censors—Breach of Condition—Remedy —Cinematograph Act, 1909 (9 *Edw.* 7, *c.* 30), *ss.* 3, 5.

A licensing committee in granting a licence under the Cinematograph Act, 1909, attached to the licence a condition "that no film be shown which has not been certified for public exhibition by the British Board of Film Censors." This Board consisted of persons appointed by traders in the film industry for censorship purposes, and had no statutory or constitutional authority:—

Held, that the condition was unreasonable and ultra vires.

Semble, if the condition had reserved to the committee the right to review the decisions of the Board, the condition would have been reasonable and intra vires.

Quaere (per Avory J.), whether the proper remedy for a licensee who has accepted a licence subject to a condition is not to apply to the Court for a writ of prohibition or mandamus, if he wishes to allege that the condition is unreasonable.

CASE stated by Justices for the Brentford Division in the County of Middlesex.

An information was laid by the appellant, who was an inspector under the Middlesex County Council, charging the respondents, as occupiers of the Gaiety Cinema, Twickenham, with having unlawfully allowed the premises to be used in contravention of one of the conditions subject to which the licence relating to the premises was granted under the Cinematograph Act, 1909. At the hearing of the information it was proved that the licence was granted subject (inter alia) to the following condition: "That no film be shown which is likely to be injurious to morality or to encourage or incite to crime, or to lead to disorder, or be in any way offensive in the circumstances to public feeling or which contains any offensive representations of living persons, or which has not been certified for public exhibition by the British Board of Film Censors. If the Licensing Committee serve a notice on the licensees that they object to the exhibition of any film on any of the grounds aforesaid that film shall not be shown." It was also proved that a film called the "Auction of Souls" was shown by the respondents at their theatre on

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November 23, 1920, and that this film had not been certified for public exhibition by the British Board of Film Censors.

No notice of objection had been served on the respondents by the Licensing Committee, and it was contended on behalf of the respondents that, before a conviction could be obtained for an infringement of the condition, notice must be served setting out the grounds of objection. It was further contended for the respondents that the County Council had no authority to delegate its powers under the Cinematograph Act, 1909, otherwise than in accordance with s. 5 of that Act (1), and that the condition in question, in so far as it delegated those powers, was ultra vires and void.

It was contended for the appellants that the condition in question created alternative offences—namely, (*a*) it forbade the exhibition of certain classes of films, and (*b*) it enabled the licensing authority to give notice that they objected to any particular film upon grounds stated in the notice; and that in the present case the offence fell under class (*a*), so that the absence of notice afforded no defence. The justices were of opinion that the condition disclosed one offence only—namely, the exhibition of a film to which objection had been taken by service of notice, and that in the absence of notice no offence had been committed.

According to statements made in the course of the arguments, the British Board of Film Censors was an unofficial body appointed by firms engaged in letting out films on hire, to act as censors of films and so to protect the interests of the trade.

The questions for the opinion of the Court were:—

(1.) Whether in the absence of notice the respondents were guilty of a breach of the condition, and

(2.) Whether the condition was lawful and within the powers of the County Council.

(1) Cinematograph Act, 1909, s. 5: "Without prejudice to any other powers of delegation whether to committees of the council or to district councils, a county council may, with or without any restrictions or conditions as they may think fit, delegate to Justices sitting in petty sessions any of the powers conferred on the council by this Act."

Eustace Hills K.C. and *Wrottesley* (*Baggallay* with them) for the appellants. As to the first question, where there is a breach of the first portion of the condition, no notice is required. Here the absence of a certificate from the British Board of Film Censors is in itself a breach of the condition and therefore no notice is necessary. As to the second question, acceptance by the licensee is the material test whether the condition is reasonable or not: *Ellis* v. *North Metropolitan Theatres.* (1) So long as the condition is not unreasonable and has relation to the use of the premises, it is valid and must be obeyed by the party accepting the licence: *London County Council* v. *Bermondsey Bioscope Co.* (2) Even if the condition is held unreasonable, it is binding; for the respondents had notice by the refusal of the Board that the film would not be allowed to be exhibited. The Cinematograph Act, 1909, s. 1, is directed only to the exhibition of "inflammable" films, and if an exhibitor elects to use films of that nature he is bound by the conditions subject to which the licence is issued. He breaks those conditions at his peril. So far as delegation of the powers of the licensing authority is concerned, there is only here such delegation as is necessary for the execution of their duties: the authority cannot inspect every film. The case is comparable to the requirement of a certificate from the electrical engineer before the electric lighting installation in a theatre can be used.

Giveen (*Bickmore* with him) for the respondents. As to the first question, the earlier portion of the condition is directory only, and the condition discloses only one offence: notice must be served by the licensing committee stating the grounds of the objection. As to the second question, acceptance of a condition does not prevent the licensee from afterwards complaining of its terms. If that were not so the decision in *London County Council* v. *Bermondsey Bioscope Co.* (2) would have been unnecessary: the point was actually raised in the argument in that case. Again, a condition was held to be ultra vires in *Theatre de Luxe* (*Halifax*) v.

(1) [1915] 2 K. B. 61. (2) [1911] 1 K. B. 445.

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Gledhill (1), where the licensee accepted the licence subject to the condition, but afterwards complained.

In *Stott* v. *Gamble* (2) Horridge J. in his judgment discusses the effect of notice in respect of a condition which is bad. He says: "If the notice was a bad notice the licensee might have ignored it, and he must be presumed in law to know it was an illegal notice if in fact it was." It follows that in the opinion of Horridge J. the acceptance of a condition does not debar the licensee from afterwards objecting to it. If that were not so the only remedy of the licensee would be by writ of mandamus or prohibition, which is inconvenient. The Cinematograph Act, 1909, is a statute the breach of which is enforced by criminal proceedings and penalties (s. 3), and that liability cannot be increased by contract between the licensing body and the licensee. The powers of the licensing body to impose conditions are limited by that Act.

As regards the condition here, no reasons are prescribed for which the British Board of Film Censors may reject films. Thus, an innocent film may be rejected without reason. Such a condition is unreasonable. In *Rex* v. *Burnley Justices*(3) the Court recognized that the conditions imposed by the justices must be reasonable, and a condition "that no film should be exhibited to which objection was taken by any three of the licensing justices" was held to be invalid.

[SANKEY J. Would the condition here have been valid if it had provided that no film which has not been certified for public exhibition by the British Board of Film Censors shall be shown without the express sanction of the licensing committee?]

No: there would still be an illegal delegation of powers by the Committee. The machinery provided by the Act is sufficient for the required purpose.

Eustace Hills K.C. in reply.

LAWRENCE C.J. In this case the justices refused to convict, because in their view the condition imposed was a

(1) [1915] 2 K. B. 49. (2) [1916] 2 K. B. 504, 508.
(3) (1916) 85 L. J. (K. B.) 1565.

condition upon breach of which notice must be served on the licensee by the licensing committee in each case before a conviction could be obtained against him. I do not think that that view is correct, but the conclusion to which the justices came is to be reached upon another ground—namely, as submitted to us by Mr. Giveen, that the requirement under the condition that a film should be certified by the British Board of Film Censors before it can be shown is bad and ultra vires the licensing committee. The condition sets up an authority whose ipse dixit is to control the exhibition of films. The effect is to transfer a power which belongs to the County Council and can be delegated to committees of the Council or to district councils or to justices sitting in petty sessions alone. I think that such a condition is unreasonable, and that the committee had no power to impose it. The first five branches of this condition are quite proper; then follows the sixth, as to the film being certified by the British Board of Film Censors, which is, in my opinion, bad. I am prepared to assume that the powers of the Board are exercised wisely and discreetly. But the committee have no power to create an absolute body from which no right of appeal exists. If, as was suggested by Sankey J. in the course of the argument, the condition had reserved to the committee the right to review the decisions of the Board, it would seem to be a reasonable condition. Upon that Mr. Giveen's answer did not convince me; for it is reasonable that no film should be shown which has not been passed by some body. But that body should not be made the final dictator, and a condition putting the matter into the hands of a third person or body not possessed of statutory or constitutional authority is ultra vires the committee. The committee are a responsible body, as also are the justices in petty sessions, both being recognized as such by statute: the British Board of Film Censors have no such authority. For these reasons it appears to me that the condition is invalid and that the appeal must be dismissed.

AVORY J. I agree that the justices were wrong in dismissing the case on the ground of absence of notice under

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the condition. In my opinion, assuming that the condition is reasonable and not ultra vires, an offence would be committed if a film were shown "which is likely to be injurious to morality, or to encourage or incite to crime, or to lead to disorder, or to be in any way offensive in the circumstances to public feeling, or which contains any offensive representations of living persons, or which has not been certified for public exhibition by the British Board of Film Censors," without service of notice as a condition precedent. I also agree, although with considerable doubt and hesitation, that the last paragraph in the condition as to the certificate of the British Board of Film Censors is so unreasonable as to be ultra vires the licensing authorities. I do so solely because, as the condition stands, the Board could prohibit the exhibition of a film, although it might be neither injurious to morality, nor an encouragement to crime or disorder, nor contain offensive representations of living persons. The Board are thus given absolute power to prohibit for reasons which may be private or may be influenced by trade considerations. I do not say that they are likely so to be influenced, but I think that this possibility is sufficient to render the condition ultra vires. For myself I doubt whether this point can be properly taken on a case stated, and whether the proper remedy is not for the applicant to come to the Court for a writ of prohibition or mandamus if he wishes to allege that the condition is unreasonable. This was the course of procedure adopted in *Rex* v. *Burnley Justices* (1), and it seems to me that where the applicant has accepted the licence with notice that it will only be granted upon certain conditions which he accepts, it may be argued that he is liable to penalties under s. 3 of the Cinematograph Act, 1909, if he breaks any of those conditions.

In view of the cases cited and particularly in view of the judgment of Lush J. in *Theatre de Luxe* (*Halifax*) v. *Gledhill* (2) I do not express any concluded opinion upon the point, but it is worthy of argument if the point is raised so as to require decision at any future time.

(1) 85 L. J. (K. B.) 1565. (2) [1915] 2 K. B. 54.

SANKEY J. As to the main question I adopt the judgment of Lawrence C.J. As to the other question, whether it is proper to raise this point in this way, I think that we are bound by authority, and that it is too late now to say that the proper remedy is by writ of prohibition or mandamus. The point was taken in *London County Council* v. *Bermondsey Bioscope Co.* (1) by Mr. Danckwerts, counsel for the appellants, who argued that the respondents having taken the licence with the condition in it, were bound by it and were liable for a breach of the condition. That argument was not upheld by the Court in that case. Again in *Theatre de Luxe* (*Halifax*) v. *Gledhill* (2), in which the question raised was whether the condition subject to which the licence was granted was ultra vires the licensing authority, Lush J. said: "On behalf of the respondent it was not disputed by Mr. Montgomery that if the condition is ultra vires, the appellants are entitled, although the licence was given and accepted with that condition, to take advantage of the contention that it is ultra vires. The question therefore is whether the condition is one which it is within the power of the licensing authority to impose." It appears to me that that is as near to a direct decision as it is possible to go. As Mr. Giveen has argued, it is not convenient to raise the question by writ of mandamus. The licensees may not wish to question the conditions before the licensing committee seek to enforce them, and to seek for a writ of prohibition or mandamus at that stage would be to take proceedings in the air. It seems to me that the present method of raising the question is both right and convenient.

Appeal dismissed.

Solicitor for the appellant: *E. S. Freeland.*

Solicitor for the respondent: *Charles Everett.*

(1) [1911] 1 K. B. 445, 448. (2) [1915] 2 K. B. 54.

F. P. F.

1921
July 11, 18.

In re DAVIES.

Ex parte MILES.

Bankruptcy—Fraudulent Assignment—Advance by Assignee in Consideration of Agreement to Assign in Future—Agreement unenforceable—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4—*Validity as against Trustee—Recital of Agreement in Assignment — Memorandum — Part Performance — Bankruptcy Act*, 1914 (4 *& 5 Geo.* 5, *c.* 59), *s.* 1, *sub-s.* 1 (*b*).

By a parol agreement between a lender and D., the former agreed to lend and did lend D. 2000*l.* in consideration of the latter's promise to assign certain interests. About a year later, in pursuance of this agreement, D. assigned these interests to the lender, and became bankrupt immediately afterwards. At the time of the assignment no memorandum of the above agreement within s. 4 of the Statute of Frauds was in existence, but it was recited in the assignment :—

Held, that the assignment, notwithstanding the failure of the bankrupt to set up the statute in answer to the claim by the lender for the performance of the agreement, did not constitute a fraudulent preference or a fraudulent conveyance under the Bankruptcy Act, 1914, and was valid as against the trustee in bankruptcy.

Held, also, that the recital of the agreement in the assignment was not admissible as a memorandum within the statute.

In re Holland [1902] 2 Ch. 360 distinguished.

Held, further, that proof of the advance of the 2000*l.* was not proof of part performance so as to take the agreement out of the statute.

Motion by the trustee in bankruptcy.

In April, 1919, negotiations were proceeding between T. L. Davies, who was not then bankrupt, and one T. W. Williams concerning a proposal of partnership between them, which was abandoned. But during the negotiations Williams promised to lend and did lend Davies 2000*l.*, the latter agreeing in consideration thereof to assign all his interest in certain hereditaments known as the Fuidge Manor Estate, near Bow, Devon. By a judgment dated July 28, 1919, in an action tried before Peterson J. (1919—D—No. 781) that interest was declared to be a charge on that estate for 1010*l.* subject to certain mortgages. On December 10, 1920, Davies executed an assignment of his above interest to Williams, reciting that in April, 1919, Davies, in consideration of being allowed to retain the 2000*l.*, had agreed to assign the said interest, and reciting further "And whereas the said

T. W. Williams has called upon the said T. L. Davies to fulfil his promise made to him in the said month of April, 1919, now this indenture witnesseth that in conformity" therewith he assigned his interest to Williams.

Subsequently to the date of this assignment, on December 29, 1920, a receiving order was made against Davies on his own petition, and he was adjudicated bankrupt on that date.

This motion was launched by the trustee asking that the assignment be set aside as an act of bankruptcy under s. 1, sub-s. 1 (*b*), of the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59).

Clayton K.C. and *Morle* for the trustee. The alleged promise to execute the assignment was made in 1919 when the respondent was hopelessly insolvent and the assignment was made too late, for he was adjudicated bankrupt a few days later. It is therefore void as an act of bankruptcy under s. 1, sub-s. 1 (*b*), of the Bankruptcy Act, 1914, as tending to defeat creditors: see *In re David and Adlard.* (1)

Hansell for the respondent. The assignment was made in pursuance of an agreement to assign made at the time of the advance of the 2000*l.*, and a long series of cases shows that it must be treated as if made at the same time as the advance: see Williams on Bankruptcy, 12th ed., p. 11. There is no suggestion that this agreement was made mala fide. It is true that owing to the operation of the Statute of Frauds the agreement is unenforceable, there being no memorandum thereof in writing signed by the bankrupt; but that is immaterial, because it is only necessary to prove a bona fide agreement and to negative fraud. The statute does not avoid the agreement, but only prevents proof thereof, and a defendant is not bound to set it up: *Ex parte Wilkinson* (2) is conclusive on this point.

But if it be necessary to bring the agreement within the statute, the assignment itself is a sufficient memorandum to satisfy it: see *In re Holland.* (3) And there has also been

(1) [1914] 2 K. B. 694. (2) (1883) 22 Ch. D. 788.
(3) [1902] 2 Ch. 360.

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part performance disentitling the trustee, representing the bankrupt, to rely on the statute : Fry on Specific Performance, 6th ed., p. 276.

Clayton K.C. in reply. The assignment of the whole of a debtor's property in consideration of an antecedent debt is prima facie an act of bankruptcy. The Court of Bankruptcy administers both law and equity, and would regard that which ought to be done—namely, this assignment—as done. But equity never applies this doctrine to an unenforceable document : see *Russel* v. *Russel* (1) and *Ex parte Coombe.* (2)

The mere advance of the 2000*l.* was not such a part performance as to take the agreement out of the statute : *Chaproniere* v. *Lambert* (3)—for the payment of money does not alter the relative position of the parties.

[*Ex parte Burton* (4) was also referred to.]

HORRIDGE J. In this case the bankrupt, on December 10, 1920, immediately before his bankruptcy, made an assignment in favour of the respondent of his interest in the Fuidge Manor Estates, and also his interest in certain contracts with one Hamlin. That assignment would clearly tend to defeat or delay the creditors of the bankrupt within the definition laid down by me in *In re David and Adlard.* (5) But it is said that it was made in pursuance of a valid agreement to give security in respect of an advance of 2000*l.* On the facts I have come to the conclusion that there was an agreement made either on April 26, 1919, when the money was advanced, or at some prior time, that the bankrupt should give security upon these two assets. I also find that the respondent pressed for security afterwards, and that he did not hold his hand in such a way as to intentionally bolster up the credit of Davies. That being so, it seems to me that the agreement is perfectly valid, were it not for the operation of the Statute of Frauds. Having stated the facts I want first to read the principle establishing that that which

(1) (1783) 2 Wh. & Tud. L. C. (8th ed.) 85.
(2) (1819) 4 Madd. 249.
(3) [1917] 2 Ch. 356, 359.
(4) (1879) 13 Ch. D. 102.
(5) [1914] 2 K. B. 694.

would otherwise be an act of bankruptcy is held not to be so, because done in pursuance of an agreement. I do not think I can state that better than by using the language of James L.J. in *Ex parte Kilner* (1) which is quoted in the judgment of Baggallay L.J. in *Ex parte Hauxwell* (2): "Where a document is set up which upon the face of it is an act of bankruptcy, that is, an assignment of all a man's goods for a past consideration, if it is said that it is not an act of bankruptcy because it is warranted by a prior agreement, the onus probandi is always upon the person who sets up the prior agreement to prove, not only that the agreement did exist in fact, but that it was in all respects a bona fide agreement." I am prepared to hold in this case that this agreement did exist in fact and that it was a bona fide agreement, subject to the point as to the Statute of Frauds. That statute was clearly applicable to this agreement, which was in the main an agreement to give security by way of assignment of an interest in land. What, therefore, is the effect of there being no memorandum within the statute?

The effect of s. 4 is dealt with in the judgment of Vaughan Williams L.J. in *In re Holland* (3): "The Statute of Frauds does not deal with the validity of the agreement . . . . it deals only with the evidence to prove the agreement, the statute requiring that the agreement shall be evidenced by a writing signed by the party thereto against whom the action is sought to be enforced." Now what was the position when this document of December 10 was entered into? There was a valid agreement under which this assignment was required to be made, but the bankrupt, when proceedings were taken against him, was entitled to set up the Statute of Frauds in answer to that agreement. Does his failure to avail himself of the provisions of that statute constitute an act of bankruptcy? I cannot think that it does. If a suit had been brought against him and he had not availed himself of the statute and a decree for specific performance had been made against him could it be said that the non-pleading

(1) (1879) 13 Ch. D. 245, 252. (2) (1883) 23 Ch. D. 626, 642.
(3) [1902] 2 Ch. 360, 375.

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of the statute in that action was an act of bankruptcy in the sense that it was an assignment of his property in such a way as to hinder or delay his creditors? I do not think so. I think the absence of the memorandum under the Statute of Frauds did not prevent the principles laid down in the case to which I have just referred (1) from applying here and therefore I think that this assignment was not an act of bankruptcy.

I am against Mr. Hansell for the respondent on the other points. I do not think that one can, in considering the question whether or not an act is an act of bankruptcy, consider the document itself, and use the recital contained in it as a memorandum of an agreement within the statute. The case of *In re Holland* (2) was a case where a settlement had been executed containing that recital. The ground upon which it was asked to be set aside was that it was a voluntary settlement. In that case the Court of Appeal said that the recital of the parol agreement to settle was a good memorandum for the purpose of proving the agreement in Court in answer to the claim to set aside the settlement. But here I have not to consider the question of proof now, but what the position was at the time that this transaction, which is said to be an act of bankruptcy, took place, and at that time there was no memorandum in existence within the Statute of Frauds.

I am also quite clear that there has been no part performance. The only thing that could be alleged to be part performance was the actual advance of the 2000*l.* under the verbal agreement. That may be referable to something else. Here is a verbal agreement proved by which 2000*l.* is to be advanced upon security being given, and there is the fact of the 2000*l.* being advanced. That does not show that it was an advance on the security. I am very much fortified in this view by the language of Swinfen Eady L.J. in *Chaproniere* v. *Lambert* (3) where he says: "It is clear that the mere payment of money does not change the relative

(1) *Ex parte Hauxwell* 23 Ch. D. 626, 642.

(2) [1902] 2 Ch. 360.

(3) [1917] 2 Ch. 356, 359.

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positions of the parties though it may give rise to a claim to recover it back."

As to the question of fraudulent preference, I think that this motion fails, because there is no doubt on the authority of *In re Vautin* (1) that this agreement even though it was not enforceable would prevent my finding that the motive was to prefer. Therefore the motion cannot be supported on the ground of fraudulent preference or on the ground that the transaction was an act of bankruptcy. I think there was a valid agreement, and the omission to plead the Statute of Frauds does not make this an assignment which delays and hinders the creditors so as to make it an act of bankruptcy.

For these reasons the motion must be dismissed with costs.

Motion dismissed.

Solicitors for trustee : *Boyce & Evans.*

Solicitor for assignee : *E. B. V. Christian.*

W. L. L. B.

HAWKINS *v.* MILN.

1921

Jan. 28.

County Court—Costs—Action begun in High Court—Less than 40*l. recovered in Contract—Power of Judge to allow Costs—Form of Order—County Courts Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 73), *ss.* 11, 12.

An action founded on contract was commenced in the High Court, and subsequently transferred to the county court, where the plaintiff recovered less than 40*l.* The county court judge ordered : " Judgment for plaintiff with costs to be taxed Column B " :—

Held, that although the order was not a sufficient order under the proviso to s. 12 of the County Courts Act, 1919, so as to entitle the plaintiff to his costs of so much of the proceedings as took place in the High Court, it was a sufficient order under the earlier part of that section to entitle him to his costs incurred in the county court subsequently to the transfer, and the Registrar was bound to tax the latter costs accordingly.

APPEAL from the Southwark County Court.

The plaintiffs brought this action in the High Court on a specially indorsed writ to recover a sum of 31*l.* 12*s.* 6*d.*, and

(1) [1900] 2 K. B. 325.

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made an application for summary judgment under Order XIV. The defendant obtained leave to defend and the action was transferred to the county court. At the hearing on July 26, 1920, the defendant admitted the debt and consented to judgment. The judge thereupon made the following order: "Judgment for the plaintiffs with costs to be taxed and paid by August 9th Column B." The plaintiffs carried in their bill of costs before the Registrar for taxation. The Registrar took the view that the judge's order of July 26 "was not an order within the meaning of s. 12, but that s. 11, sub-s. 1 (1), applied to the taxation" and he disallowed the whole of the plaintiffs' costs including those of the proceedings in the county court after the transfer as well as those of the proceedings in the High Court, upon the ground that the plaintiffs having commenced an action founded on contract in the

(1) By s. 11, sub-s. 1, of the County Courts Act, 1919, "Where an action is brought in the High Court which could have been commenced in a county court, then, if the plaintiff recovers a sum less, in the case of an action founded on a contract, than forty pounds . . . . he shall not be entitled to any costs of the action. . . . ."

"Provided that (i.) in any such action . . . . the court or a judge . . . . if satisfied that there was sufficient reason for bringing the action in the High Court or that the defendant or one of the defendants objected to the transfer of the action to a county court, may make an order allowing the costs or any part of the costs on the High Court scale or on such one of the county court scales and under such one of the columns in the scale as he may direct."

Sub-s. 2: "This section applies only to the costs of the proceedings in the High Court."

By s. 12: "Where an action . . . . is transferred from the High Court to a county court . . . . the costs of the whole proceedings both before and after the transfer . . . . shall, subject to any order made by the court which ordered the transfer . . . . be in the discretion of the court to which the matter is transferred, and that court shall have power to make orders with respect thereto and as to the scales or columns on or under which the costs of the several parts of the proceedings are to be taxed, and the costs of the whole proceedings shall be taxed in that court."

"Provided that, as regards so much of the proceedings in any action transferred from the High Court to a county court as take place in the High Court before the transfer, the costs thereof shall be subject to the provisions of the last foregoing section of this Act, and the powers of the court or a judge under that section to make an order allowing costs on the High Court scale or on or under any county court scale or column shall, subject to any order of the court or judge by whom the transfer was ordered, be exercisable by the judge of the county court."

High Court which might have been commenced in the county court and having recovered less than 40*l.* were not entitled to any costs at all. The plaintiffs applied to the county court judge to review. On September 27 the matter came before the judge. The plaintiffs' solicitor drew his attention to sub-s. 2 of s. 11 and insisted that at all events sub-s. 1 had no application to that portion of the costs which had been incurred in the county court. The judge however affirmed the order of the Registrar.

The plaintiffs appealed.

T. E. Haydon for the plaintiffs. The refusal of the Registrar and county court judge to allow the plaintiffs any costs at all apparently proceeded upon the assumption that the order of July 26 was not an order within s. 12. It may be that it was not an order relating to the costs of the proceedings in the High Court within the proviso to s. 12, for it was silent as to the costs of that part of the proceedings. But it clearly was an order within the earlier part of s. 12 that the plaintiffs should have their costs of the proceedings in the county court subsequent to the transfer. How the Registrar found any justification in s. 11 for depriving the plaintiffs of the latter costs it is difficult to see. Sect. 11 has nothing to do with the costs of those proceedings. It is expressly limited to the costs of the proceedings in the High Court.

The judge has practically rescinded his former order, which he had no right to do.

Sandilands for the defendant.

AVORY J. I think that the county court judge has been led into error. The defendant consented to judgment for 31*l.* 12*s.* 6*d.*, and the record of the Court shows that the judge ordered judgment to be entered for the plaintiffs "with costs to be taxed and paid by August 9th Column B"—that is, the column of the County Court Higher Scale applicable where the sum recovered is between 20*l.* and 50*l.* That order having been made the plaintiffs went before the Registrar to tax. He took the view that the order was not an order

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within s. 12, and disallowed the whole of the costs both in the High Court and in the county court upon the ground that the action was one which might have been commenced in the county court and less than 40*l.* had been recovered, and that consequently the plaintiffs were precluded by s. 11, sub-s. 1, from recovering any costs at all. Then there was an application to the judge to review the Registrar's order. He however affirmed it, thinking that the Registrar was right in refusing to allow any costs. He apparently adopted the view of the Registrar that the order of July 26 was not an order under s. 12, and that therefore s. 11 automatically deprived the plaintiffs of their costs. But although the order of July 26 was not an order under the proviso to s. 12 it is impossible to say that it was not an order under the earlier part of that section. [He read that part of the section.] The proviso to s. 12 is expressly limited to the costs incurred before transfer, and the effect of it is that in the absence of a special order of the county court judge allowing the plaintiffs their costs of the proceedings in the High Court, and specifying whether they are to be on the High Court or the county court scale, s. 11 is left to apply and the plaintiffs get no costs in respect of that part of the proceedings. Here the judge's order was silent as to the costs of the proceedings in the High Court. The result is that the plaintiffs are under the judge's order entitled to have their costs taxed in respect of the proceedings in the county court but not those in respect of the proceedings in the High Court, and the case must be remitted to the Registrar with a direction to that effect.

SALTER J. I agree. The object of s. 11 of the Act of 1919 is to discourage the bringing of actions in the High Court in which less than 40*l.*, in the case of actions founded on contract, is likely to be recovered, and to effect that object it provides that in the event of less than that amount being recovered the plaintiff gets no costs, unless the judge is satisfied that one or other of the two conditions mentioned in s. 11, sub-s. 1, proviso (i.), as empowering him to allow such costs exists, and he makes an express order to that effect. On the

transfer of an action from the High Court to the county court the plaintiffs' position is somewhat improved, for as regards the costs of the proceedings in the county court subsequent to transfer the discretion of the county court judge is not fettered by any such conditions. Here the judge on July 26 exercised his discretion in favour of giving the plaintiffs their costs of the proceedings in the county court, but he did not make any order that they should have their costs of the proceedings in the High Court. The Registrar must therefore tax the former costs but not the latter.

Appeal allowed.

Solicitor for the plaintiffs: *Leonard North.*
Solicitors for the defendant: *Garland & Wells.*

J. F. C.

KIRK *v.* CUNNINGTON.

1921
May 31;
June 24.

Revenue—Income Tax—Landlord's Property Tax—Right of Tenant to deduct several Years' Tax from "next payment of rent"—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 211, *sub-s.* 2.

Where a tenant makes no payment of rent for several years, but pays the landlord's property tax in respect of those years, and then makes a payment of rent to the landlord, that payment is the "next payment of rent" within the meaning of s. 211, sub-s. 2, of the Income Tax Act, 1918, and the tenant is entitled under that section to deduct from that payment not merely the property tax for the current financial year but the sums paid in respect of property tax during those years in which no rent was paid.

APPEAL from the judge of the Peterborough County Court.

On March 25, 1915, a house at Skegness was let to the defendant on a quarterly tenancy subject to three months' notice to quit at a rent of 26*l.* per annum. The defendant was a jobbing gardener and the house was let to him in consequence of that employment. He did certain work for the plaintiff's predecessor in title, and the amount due to the defendant in respect of this was credited to his rent account

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but the defendant himself never paid any rent. In August, 1916, a payment of 15*l.* was made to the landlord in respect of the rent up to March 25, 1916, out of a fund called the Canadian Fund, which was being used in order to relieve the distress at Skegness, but no payments were made out of the fund unless the landlord subsidised the payments to the extent of 25 per cent. and the defendant was therefore credited with a rebate of 6*l.* 10*s.* In May, 1918, a further sum of 9*l.* 17*s.* 6*d.* was received by the landlord from the Canadian Fund and the defendant was credited with 3*l.* 2*s.* 6*d.* as a debit against the landlord. These payments, together with two accounts for work done amounting to 12*l.* 16*s.* 7*d.* and 6*s.* 7*d.*, made the sums credited to the defendant in respect of rent from March 25, 1915, to March 25, 1918, amount to 47*l.* 13*s.* 1*d.* The balance of rent due to March 25, 1918, amounting to 30*l.* 6*s.* 11*d.*, was written off.

In September, 1918, the plaintiff entered into possession of the premises as first mortgagee. He brought two actions against the defendant in the county court to recover possession of the premises. These actions failed on account of the invalidity of the notice to quit.

On March 15, 1920, the plaintiff gave the defendant three months' notice to quit expiring on June 24, 1920. On June 24, 1920, the total arrears of rent from March 25, 1918, amounted to 58*l.* 10*s.*

On July 2, 1920, the defendant's solicitor tendered to the plaintiff two cheques for 34*l.* 8*s.* in settlement of the amount due for rent, the balance of 24*l.* 2*s.* being deducted in respect of the landlord's property tax—namely, 7*l.* 1*s.* 9*d.* for the year ending April 5, 1918, two payments of 4*l.* 5*s.* and 4*l.* 5*s.* 1*d.* for the year ending April 5, 1919, and two payments of 4*l.* 5*s.* 1*d.* and 4*l.* 5*s.* 1*d.* for the year ending April 5, 1920. The defendant's solicitor stated in Court that all these payments, except the last, were made on February 9, 1920. The plaintiff refused to accept the cheques tendered as it might prejudice his claim, but not on the ground that the tender was by cheque.

On July 15, 1920, the plaintiff commenced the present

proceedings in the Spilsby County Court, by which he claimed to recover possession of the premises, 58*l.* 10*s.* arrears of rent from March 25, 1918, to June 24, 1920, and mesne profits. The defendant paid 38*l.* 18*s.* 4*d.* into Court—namely, 34*l.* 8*s.* in respect of rent and 4*l.* 10*s.* in respect of fees and costs.

The county court judge gave judgment for the defendant.

On appeal the Divisional Court ordered a new trial in the Peterborough County Court. The claim was then amended so as to claim in addition 18*l.* 7*s.* for mesne profits. The defendant in answer set up a plea of tender. The defendant tendered the quarters' rents as they fell due in September and December, 1920, but those payments were not accepted by the plaintiff.

The county court judge found: (1.) That the house was let to defendant on a quarterly tenancy subject to three months' notice to quit. (2.) That it was let to him in consequence of his employment as a part time jobbing gardener. (3.) That rent was in arrear. (4.) That the plaintiff reasonably required the house for his own occupation. (5.) That in the circumstances of the case the defendant had no right to deduct the payments in respect of the landlord's property tax from the amount of rent due. (6.) That the plea of tender was bad. (7.) That he considered it reasonable to make an order for possession. He accordingly gave judgment for the plaintiff for 37*l.* 18*s.* 8*d.* and an order for possession.

The county court judge, in answer to an inquiry by the Divisional Court, said that he held as a matter of law that "a tenant can only deduct property tax for the current financial year."

The defendant appealed.

D. H. J. Hartley for the defendant. The tender of rent which the defendant made on July 2, 1920, was a good tender and therefore the plaintiff is not entitled to an order for possession under s. 5, sub-s. 1 (*a*), of the Rent Restriction Act, 1920, on the ground that rent lawfully due from the tenant had not been paid. The defendant was entitled under

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s. 211, sub-s. 2, of the Income Tax Act, 1918 (1), to deduct the property tax which he had paid for the three years 1918, 1919, 1920, from the amount of rent claimed by the plaintiff and he tendered to the plaintiff the balance. The amount tendered was the "next payment of rent" after the passing of the Act imposing the tax and therefore came directly within the terms of the section.

Arthur Lawton for the plaintiff. It was held in *Hill* v. *Kirshenstein* (2) that a tenant who pays a sum in respect of landlord's property tax and omits to deduct it from his next payment of rent has no right to deduct it subsequently. Only property tax for the current financial year can be deducted under s. 211, sub-s. 2, of the Act of 1918, from any payment of rent that is made. In the First Schedule to the Act, Sch. A, Rule No. VIII. (1.), it is provided that "a tenant occupier of any lands, tenements, hereditaments or heritages who pays the tax shall be entitled to deduct and retain in respect of the rent payable to the landlord for the time being . . . . an amount representing the rate or rates of tax in force during the period through which the said rent was accruing . . . . out of the first payment thereafter made on account of rent." That shows that it was not intended that a tenant should be entitled to deduct more than one year's property tax.

Hartley in reply. *Baker* v. *Davis* (3) shows that where a tenant has paid the landlord's property tax before action brought for use and occupation, he has a right to deduct it at the trial. There the tax was deducted from three quarters of a year's rent.

Cur. adv. vult.

(1) Income Tax Act, 1918, s. 211, sub-s. 2: "Any person liable to pay any rent, interest or annuity, or to make any other annual payment, shall be authorised to make any deduction on account of tax for any year of assessment which he has failed to make previously to the passing of the Act imposing the tax for that year, or to make up any deficiency in any such deduction which has been so made, on the occasion of the next payment of the rent, interest or annuity, or making of the other annual payment after the passing of the Act so imposing the tax. . . . ."

(2) [1920] 3 K. B. 556.

(3) (1813) 3 Camp. 474.

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June 24. LUSH J. This case raises a question of law of considerable importance. It was said on behalf of the plaintiff that although a tenant is entitled under the Income Tax Act, 1918, to deduct property tax which he has paid from the rent that he pays to his landlord, he is only entitled to deduct the property tax for the current financial year, and inasmuch as the defendant deducted arrears of property tax for several years, it was said that he had deducted more than the statute allowed him to deduct. On the other side, it was contended that there was no such restriction upon the defendant's right to deduct property tax. It was not clear from the county court judge's notes what view he had taken upon that important point. One of the questions which the county court judge had to decide was whether the defendant was in arrear with his rent. The defendant said that he had tendered the full amount of rent that was due. He had in fact deducted the landlord's property tax, not only for one year, but for several years, from the amount of rent due and had tendered the balance, and he claimed the right to do so. Therefore, it was of vital importance to know whether he was entitled to deduct several years' arrears of property tax. We could not be sure when the county court judge said that in the circumstances of the case the defendant had no right to deduct the payments in respect of the landlord's property tax, whether he had held that the tenant was only entitled to deduct property tax for the current financial year, or whether he had held that there had been a payment of rent since the earlier sums of property tax had been paid by the tenant, in which case the tenant would have deducted more property tax than he was entitled to do. We have accordingly consulted the learned county court judge, and he has informed us that he held, as a matter of law, "that a tenant can only deduct property tax for the current financial year." We have therefore to consider whether that view is right or wrong. In my opinion the view which the county court judge adopted was an erroneous one. Sect. 211, sub-s. 2, of the Income Tax Act, 1918, provides as follows: "Any person liable to pay any rent . . . . shall be authorised

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to make any deduction on account of tax for any year of assessment which he has failed to make previously to the passing of the Act imposing the tax for that year, or to make up any deficiency in any such deduction which has been so made, on the occasion of the next payment of the rent." In my opinion, that means that if a tenant, by the indulgence of his landlord, or otherwise, makes no payment of rent, say, for two years, and then pays the rent due for those two years, that payment of rent is "the next payment of the rent" within the meaning of s. 211 which in my opinion contains nothing to prevent the tenant from deducting the property tax for both the preceding years. All that the section requires is that when a tenant pays his property tax, he shall deduct the amount of the property tax so paid from the next payment of rent which he makes, and, if he has paid property tax two years before that payment is made and again one year before that payment is made, he is entitled to deduct both the sums so paid in respect of property tax from that next payment of rent. Therefore I think that the learned judge took an erroneous view when he held that the defendant could only deduct property tax for the current financial year.

But that however does not dispose of this case, as there had been a payment of rent in May, 1918—that is two years before the defendant made the tender for rent which he relies upon in this case. That payment of rent was paid to the plaintiff, not by the defendant, but out of a fund called the Canadian Fund provided for the assistance of persons situated like the defendant, and there remains still this question of fact to be decided by the county court judge: whether the money which the plaintiff thus received, was paid in satisfaction of the rent due from the defendant. If it was, and if the defendant availed himself of that payment and treated his rent as having been paid and if the defendant had already paid the property tax for the year 1918 there has been a payment of rent before the defendant's tender of rent was made from which the property tax ought to have been deducted, as that would be the next payment of rent within the meaning of

s. 211 of the Income Tax Act, 1918. That is a question which the plaintiff is entitled to have heard and decided.

Therefore, this case must be sent down to the county court judge on one specific question and one specific question only: Was the defendant in arrear with his rent at the time of the issue of the plaint?

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SANKEY J. I agree, and do not wish to add anything.

Solicitors for plaintiff: *Gibson & Weldon, for T. L. Kirk, Nottingham.*

Solicitors for defendant: *Rawlings, Butt & Bowyer, for Cecil Crust, Spalding.*

R. F. S.

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July 18, 19.

Emergency Legislation—Landlord and Tenant—Dwelling House—Increase of Rent—Notice of Increase—Validity—Service concurrently with Notice to quit—Increase to take Effect immediately on Expiry of Notice to quit—Time for Commencement of Increase—Not till Landlord "entitled to obtain possession"—Length of Notice—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 3, *sub-ss.* 1, 2.

A notice to increase the rent of a dwelling house to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applies, after the termination of an existing tenancy thereof, the notice being of the length and otherwise in the form prescribed by the Act, is not invalid under the provisions of s. 3 of the Act or otherwise by reason of the fact that it is served along with or during the currency of the notice to quit by which the tenancy is determined and therefore before the termination of the tenancy, or that it is to take effect immediately after the termination of the tenancy.

Sect. 3, sub-s. 1, of the above Act provides that nothing in the Act shall be taken to authorize any increase of rent "except in respect of a period during which but for this Act the landlord would be entitled to obtain possession . . . .":—

Held, that in that sub-section the words "be entitled to obtain possession" mean have a legal right to possession, and do not mean be able to enforce possession by an order of the Court; and,

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* LORD STERNDALE M.R. and ATKIN L.J. sitting as a Divisional Court of the King's Bench Division.

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consequently, that the period there specified is a period commencing on the date on which the landlord acquires a legal right to possession, as, for example, on the expiry of a valid notice to quit, and not on the later date on which by having taken legal proceedings he secures an order for possession from the Court.

Sect. 3, sub-s. 2, of the above Act provides that no increase of the rent of any dwelling house to which the Act applies shall be due or recoverable "until or in respect of any period prior to the expiry of four clear weeks, or, where such increase is on account of an increase in rates, one clear week, after the landlord has served upon the tenant a valid notice in writing of his intention to increase the rent, which notice shall be in the form contained in the First Schedule to this Act, or in a form substantially to the same effect. . . . ."

A notice of increase of rent under the Act, which was dated October 23, 1920, and served by post the following day, stated that the increase on account of rates "will date from November 24, 1920, being one clear week from the date of this notice," and that the increase on account of other matters "will date from November 24, 1920, being four clear weeks from the date of this notice":—

Held, that that notice was not prevented by that sub-section or by reason of any ambiguity from being a valid notice of increase of rent as from November 24, 1920, on account of both rates and other matters.

APPEAL from Marylebone County Court.

The plaintiff, Walter Hill, had let to the defendant, Gretchen Hasler, widow, a dwelling house consisting of the first floor of No. 28 Westbourne Square, Paddington, in the county of London, for a term of years at a rent of 38*l.* a year, payable in monthly instalments of 3*l.* 3*s.* 4*d.*, and the term was still current when the letters next hereinafter mentioned were written.

On May 23, 1918, the defendant wrote to the plaintiff: "Herewith I enclose 6*l.* 6*s.* 8*d.* being two months' rent to May 24th. My fourth year ends on June 24th. After that date will you please allow me to become a monthly tenant that means giving a month's notice. Not that I intend leaving, but I think I arranged to let you have a quarter's notice when writing you on the subject last year."

The plaintiff replied: "I will be pleased to allow you to become a monthly tenant as you desire."

On October 23, 1920, the plaintiff wrote to the defendant: "Dear Madam. Upon going through my various papers I came across a letter from yourself and my reply to same, a copy of which I enclose herewith. I admit this had been

overlooked at the time of our correspondence recently. But in any case it materially alters the aspect of our respective views since it is now apparent your tenancy is a monthly one only, and therefore enclose herewith: 1. A copy of your letter and my answer. 2. A month's notice to quit. 3. A notice of increase of rent to take effect in the event of your electing to take advantage of the Rent Restrictions Act, 1920, and remain as a statutory tenant."

The notice to quit was dated October 24, 1920, and notified the defendant to quit and yield up possession of the premises on or before November 24, 1920.

The notice of increase of rent, which purported to be made under and in the form prescribed by the Act with the omission of certain parts, was dated October 23, 1920, and was, so far as material, as follows:—

"Take notice that I intend to increase the rent of 3*l.* 3*s.* 4*d.* per month at present payable by you as tenant of the above-named premises by the amount of 1*l.* 6*s.* 2*d.* per month making a total rent of 4*l.* 9*s.* 6*d.* per month. The increase is made up as follows:—

"(*b*) 3*l.* 6*s.* 9*d.* under para. (*b*) of sub-s. 1 of s. 2 of the Act (1) on account of an increase in the rates payable by me . . . . in respect of the premises.

"(*c*) 1*l.* 10*s.* 0*d.* under para. (*c*) of sub-s. 1 of s. 2 of the Act (1), being five per cent. on the net rent

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920:—

Sect. 2: "(1.) The amount by which the increased rent of a dwelling-house to which this Act applies may exceed the standard rent shall, subject to the provisions of this Act, be as follows, that is to say: [The sub-section sets out the permitted increases.]

Sect. 3: "(1.) Nothing in this Act shall be taken to authorize any increase of rent except in respect of a period during which but for this Act the landlord would be entitled to obtain possession. . . . .

"(2.) Notwithstanding any agreement to the contrary, where the rent of any dwelling-house to which this Act applies is increased, no such increase shall be due or recoverable until or in respect of any period prior to the expiry of four clear weeks, or, where such increase is on account of an increase in rates, one clear week, after the landlord has served upon the tenant a valid notice in writing of his intention to increase the rent, which notice shall be in the form contained in the First Schedule to this Act, or in a form substantially to the same effect. . . . ."

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of the premises. The net rent per annum is 29*l.* 19*s.* 6*d.* The standard rent per annum is 38*l.* 0*s.* 0*d.*

"(*d*) 7*l.* 10*s.* 0*d.* under para. (*d*) of sub-s. 1 of s. 2 of the Act in respect of repairs, being 5*l.* per cent. on the net rent of the premises. The net rent per annum is 29*l.* 19*s.* 6*d.* The standard rent per annum is 38*l.* 0*s.* 0*d.*

"The increase under head (*b*) will date from Nov. 24, 1920, being one clear week from the date of this notice. The increase under heads (*c*) and (*d*) will date from Nov. 24, 1920, being four clear weeks from the date of this notice. The increase under head (*d*) is on account of my responsibility for repairs for no part of which are you under an express liability. . . . ."

The defendant did not give up possession at the expiration of the notice to quit. She declined to pay more than the original rent, alleging that the notice of increase was invalid under the Act, as it had been served along with the notice to quit and before the expiration of the term of the tenancy, and as it was to take effect immediately upon the expiration of the notice to quit and of the tenancy.

On March 21, 1921, the plaintiff brought an action in the county court against the defendant, his particulars of demand being: To increase over the above-mentioned standard rent in respect of the tenancy of the premises as follows: December 24, 1920, to one month's increase in respect of rates pursuant to the said notice of increase under s. 2, sub-s. 1 (*b*), of the Act, 11*s.* 1*d.* To one month's increases under s. 2, sub-s. 1 (*c*) and (*d*), of the Act of 5 per cent. and 25 per cent. respectively on the above-mentioned net rent pursuant to the said notice, 14*s.* 10*d.* January 24, 1921, to one month's increases as above, 1*l.* 5*s.* 11*d.* February 24, 1921, to one month's increases as above, 1*l.* 5*s.* 11*d.* Total, 3*l.* 17*s.* 9*d.*

On April 18, 1921, the county court judge gave judgment as follows: The question raised in this case was whether a notice of increase of rent under the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which

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was dated October 23, 1920, and was served on the tenant together with a notice to quit dated October 24, 1920, purporting to determine the defendant's tenancy upon November 24, 1920, was a valid notice, having regard to the provisions of s. 3, sub-ss. 1 and 2, of the above-mentioned Act. (1) The notice of increase in question as regards all the specified increases required the defendant to pay the same in each instance as from the 24th day of November, 1920. I held the notice of increase in question was not a valid notice under the above provisions of the Act. I was of opinion that even if the notice of increase had been of the same date as the notice to quit, it was only a provisional notice until the expiration of the term, that it would not become a valid notice until that expiration; and that the four clear weeks and one clear week respectively would begin to run only as from the 24th day of November, 1920. Judgment for defendant.

The plaintiff gave notice of appeal that that judgment might be set aside and judgment entered for the plaintiff on the grounds: (1.) that the judge was wrong in law in holding that the notice of increase of rent served with the notice to quit was not a valid notice under the Act; (2.) that the judge was wrong in law in holding that the notice of increase would not become a valid notice until the expiration of the tenancy and that the four clear weeks and one clear week respectively would begin to run only from November 24, 1920; (3.) that on the construction of s. 3, sub-ss. 1 and 2, of the said Act (1) the plaintiff had complied with the provisions of the Act and/or that it was competent for the plaintiff to serve a notice of increase with a notice to quit both to run concurrently and so that the notice of increase would take effect as from the expiration of the notice to quit.

D. Rowland Thomas for the plaintiff, appellant. The plaintiff is entitled to recover the increased rent which he claims and the judgment of the county court judge to the contrary effect was wrong and should be reversed. The

(1) See note (1) ante, p. 645.

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notice of increase of rent given by the plaintiff to the defendant was in all respects a valid notice. There is nothing in s. 3 of the Increase of Rent, &c. (Restrictions), Act, 1920, or in any other provision of that Act to sanction the view that a notice of increase such as that in question is only a provisional or conditional notice. A notice of increase of rent after the termination of an existing tenancy is not rendered invalid by being served along with the notice to quit by which the tenancy is determined, or by purporting to take effect immediately upon the termination of the tenancy; and when such a notice as that has been given, if the tenant continues in possession, the landlord is entitled to the increased rent from the commencement of the new tenancy: *Ahearn* v. *Bellman*. (1)

F. G. Enness, for the defendant, respondent. The plaintiff is not entitled to the increased rent. The notice of increase of rent given by the plaintiff to the defendant was not a valid notice under the Act of 1920. By s. 3, sub-s. 1, of the Act an increase of rent is not authorized except in respect of a period during which but for the Act the landlord would be "entitled to obtain possession." These words mean entitled to obtain possession under an order of the Court, and the period referred to in that sub-section commences not immediately on the termination of the tenancy by the expiration of a valid notice to quit or otherwise, but only after the lapse of the additional time within which the landlord could by process of law obtain an order for possession. This notice of increase was a notice of the plaintiff's intention to increase the rent immediately on the expiration of the concurrent notice to quit and made no allowance for the further time required for obtaining an order for possession, and it therefore contravened that sub-section and was invalid.

By s. 3, sub-s. 2, no increase of rent shall be due or recoverable until or in respect of any period prior to the expiry of four clear weeks, or where the increase is in respect of rates one clear week, after the service of the notice of increase. The notice of increase in question in respect both of rates and of

(1) (1879) 4 Ex. D. 201.

other matters was dated October 23, 1920, and was served on the following day, and it stated that the increase in respect of rates would date from "Nov. 24, 1920, being one clear week from the date of this notice," and that the increases in respect of other matters would date from "Nov. 24, 1920, being four clear weeks from the date of this notice." The notice was therefore on the face of it in respect both of rates and other matters ambiguous and invalid. Moreover, if the notice is to be construed as meaning that all the increases are to take effect on November 24, 1920, then the increase for which it provided in respect of rates would not commence one clear week, and the increases for which it provided in respect of other matters would not commence four clear weeks after service of the notice, and accordingly the notice as regards all the matters to which it relates was longer than this sub-section presumably fixes, and therefore invalid.

Thomas in reply. Under s. 3, sub-s. 1, the landlord would be "entitled to obtain possession" as soon as the original tenancy had terminated by expiry of a notice to quit or otherwise, regardless of any additional time that might be required for obtaining an order of the Court for possession. Under sub-s. 2 a notice of increase of rent is not invalid by reason of its being longer than is necessary. A notice such as this is no doubt provisional or conditional in the sense that the increased rent which it specifies does not become due or recoverable until the notice has expired, but the notice is not invalid on that account: *Steel* v. *Mahoney*. (1)

LORD STERNDALE M.R. This is an appeal from a decision of the judge of the Marylebone County Court in a case arising under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The plaintiff, the landlord, gave the defendant, the tenant, a notice to increase the rent over the standard rent at the expiration of the tenancy if the defendant elected to continue on as a statutory tenant. The defendant continued as tenant after the expiration of the tenancy, but declined to pay the increased rent, and the landlord sued

(1) [1918] W. N. 253.

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him for the amount of the increase. The county court judge has held that the plaintiff is not entitled to recover on the ground that the notice to increase the rent was not a good notice.

The circumstances in which the case arose, so far as it is necessary to mention them, are these: [His Lordship stated the material facts of the case, reading the correspondence between the parties the notice to quit and the notice of increase of rent, and observing that the notice to quit seemed to be a perfectly good notice, and that the notice of increase followed in the main the form given in the schedule to the Act, and continued:] The county court judge held that the notice of increase in question was not a valid notice under the provisions of the Act. He did not explain in what way that notice sinned against the Act. He said: "I was of opinion that even if the notice of increase had been of the same date as the notice to quit it was only a provisional notice until the expiration of the term, that it would not be a valid notice until that expiration, and that the four clear weeks and one week respectively would begin to run only as from the 24th day of Novr., 1920." I regret to say that I do not quite follow that part of his judgment. The notice of increase does not seem to me to be a provisional notice, but a very clear final notice that the plaintiff intends to increase the rent. It is true that it indicates that the plaintiff intends to increase the rent in case a certain event happens—namely, in case the defendant elects to stay on after the expiration of the tenancy as a statutory tenant. If the defendant had elected not to remain and had gone and vacated the premises at the expiration of the notice to quit, of course there would have been no increase of rent, because she would have been paying no rent at all. But when, after having received that notice, she elected to stay on as a statutory tenant, then by virtue of her so doing the notice if otherwise valid became effective and the rent became payable by contract.

The learned county court judge seems to me to have held that the notice of increase was invalid on the ground that

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a notice of that kind cannot be given until the determination of the tenancy. In the course of the argument it was contended on behalf of the defendant that the notice was invalid on several other grounds. In order to ascertain whether or not these views are correct one has to look at the material provisions of the Act, which are to be found in s. 3, sub-ss. 1 and 2. It may perhaps be that sub-s. 3 is also relevant, because, if the contention of the defendant and the decision of the learned judge be right, then that sub-section is quite unnecessary. I do not think, however, that that consideration determines the matter, inasmuch as the Legislature does from time to time insert provisions in Acts not because it regards them as absolutely necessary in every case, but merely perhaps ex majore cautelâ. But, however that may be, sub-ss. 1 and 2 are the effective provisions.

Sub-s. 1 provides that nothing in the Act shall authorize any increase of rent "except in respect of a period during which but for this Act the landlord would be entitled to obtain possession." That sub-section says nothing about the time at which the notice of increase of rent is to be given. What it does say is that an increase of rent cannot be charged except in respect of a period during which but for the Act the landlord would have been entitled to obtain possession. In this case, in my opinion, the increases are charged in respect of a period of that description. The plaintiff had given a valid notice to quit which had expired, and the period commencing on the expiration of the notice to quit was, it seems to me, a period during which but for the Act he would have been entitled to obtain possession. It was contended on behalf of the defendant that this opinion is not correct, because, as I understand the argument, on the true construction of the sub-section the words "entitled to obtain possession" must mean entitled to obtain possession under an order of the Court, and therefore that the period contemplated could not commence before the expiration of the time within which it would have been competent for the landlord to obtain an order for possession, that is to say, until after the landlord could have issued and served a writ for possession and all

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the other proceedings could have taken place which were necessary to entitle him to an order for possession. I do not agree. The words "entitled to obtain possession" seem to me to mean having a legal right to possession. I therefore think that in this case as soon as the notice to quit had expired the landlord but for the Act would have been entitled to obtain possession thereunder. If the tenant had then gone out, the landlord could immediately have gone in. As the tenant did not then go out the landlord was in a position to obtain an order for possession from the Court; and if he was in a position to obtain an order for possession from the Court, I think he was "entitled to obtain possession" within the meaning of this sub-section, although as a matter of fact the time within which it would be possible for him according to the process of the Court to get that order had not expired. I think, therefore, that there is nothing in sub-s. 1 to invalidate the plaintiff's notice of increase of rent or his claim for the increased rent.

Sub-s. 2 provides that where the rent is increased, "no such increase shall be due or recoverable until or in respect of any period prior to the expiry of four clear weeks, or, where such increase is on account of an increase in rates, one clear week, after the landlord has served upon the tenant a valid notice in writing of his intention to increase the rent, which notice shall be in the form contained in the First Schedule to this Act, or in a form substantially to the same effect." That sub-section, so far as its grammar is concerned, perhaps leaves a little to be desired, but I think it means that the increase where it is on account of some matter other than rates shall not be due or recoverable until the expiration of four clear weeks, or where it is on account of rates one clear week, after service of the notice or increase. In this case the notice specified a time for the beginning of the increase on account of matters other than rates which was considerably more than four clear weeks after service of the notice of increase; and as regards that part of the increase it thus related to an increase which was not to begin until or in respect of a period prior to the expiry of four clear weeks from the date of service

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of the notice upon the defendant, and the plaintiff has not even claimed it from the actual day but from the day subsequent to the date of that expiry. It therefore seems to me that so far as the time for the commencement of this part of the increase is concerned the notice does not sin against this sub-section, but is a good notice. Again, the notice instead of giving the defendant only the one clear week required by the sub-section before the beginning of the increase on account of rates has given her four clear weeks, and if it has given her four weeks, the increase is not to take place until or in respect of any period prior to the expiry of one clear week after the notice. I therefore think that, as regards the time for the increase on account of rates also, the notice does not offend against this sub-section, but is perfectly valid.

The county court judge, however, seems to have taken the view that the notice of increase was not a valid notice because it was served during the continuance of the tenancy, although there is no objection to the period limited in the notice. I can see nothing in s. 3 or in any other provision of the Act which requires that a notice to increase rent must be given after the expiration of the tenancy. It is true that the increased rent cannot be charged in respect of a period during the continuance of the tenancy, because during the continuance of the tenancy the landlord is not entitled to obtain possession. If however the increase is charged only in respect of a period for which it can properly be charged, as I think it is here, I can find nothing in the Act to prevent the notice from being given during the currency and continuance of the tenancy. In that case there is no reason why the periods of one week and four weeks respectively specified in the notice should not begin to run before the determination of the tenancy. With all respect, I think that the judgment of the learned county court judge on this point was not correct.

It seems to me that this notice of increase of rent was a valid notice given at the proper time, which does not in any way impugn the provisions of the Act, and as no other objection has been taken to the recovery of the increased

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rent by the plaintiff, I think he is entitled to succeed in his claim.

I am therefore of opinion that the appeal should be allowed and judgment entered for the plaintiff with costs.

ATKIN L.J. I agree. As we are differing from the learned county court judge, I will state the grounds upon which my view is based.

I may say that I should have been glad to know the reasons which led the county court judge to give judgment for the defendant, because the reasons for a judgment given by that learned judge are always deserving of the fullest consideration. In the absence of any further statement of his views than we have before us, I have, however, come to a fairly clear conclusion that this appeal should be allowed.

The first point taken by counsel for the defendant turned upon s. 3, sub-s. 1, of the Act of 1920, which provides that nothing in the Act shall be taken to authorize any increase of rent except "in respect of a period during which but for this Act the landlord would be entitled to obtain possession." His point was, if I understand it aright, that these words mean that no increase can be charged except in respect of a period during which the landlord would be entitled to possession under an order of the Court. He would not go so far as to say that the landlord must actually have obtained an order of the Court, because that contention would have been obviously inconsistent with the frame of the Act which is designed to enable the landlord to get his rent. He did, however, say that there must be a notional interval of time during which the landlord would be able to take the proceedings necessary for obtaining an order, and that that interval must be brought into account before fixing the commencement of the period mentioned in the sub-section. To my mind that contention is not well founded. I see nothing in the Act which would justify us in saying that the words in question carry the meaning suggested, and I think that they must be understood in their plain and obvious sense as

meaning a period during which the landlord would have a legal right to obtain possession of the premises, that is to say, a period commencing at the time when the tenant would no longer have a legal right to remain in possession under the original tenancy.

The substantial question, however, is whether under sub-s. 2 the notice to increase the rent either in respect of rates or in respect of the statutory percentage can be served before the commencement of the period previously referred to during which but for the Act the landlord would be entitled to obtain possession. The county court judge has accepted the view that under that sub-section the notice cannot be served before that period has arrived, but I can see no words in the Act which require that construction to be applied to the sub-section, or which prevent the notice from being served before that period. It is to be observed in the first place that neither sub-s. 1 nor sub-s. 2 purports to deal with a period during which the notice of increase is to be given. Each of these sub-sections purports to deal only with the period in respect of which the permitted increase of rent can be charged. It is further to be observed that the way in which an increase of rent is effected under the Act, as it also is apart from the Act, is by contract. The landlord has a right to make an offer to his tenant that if the tenant wishes to remain on he must do so upon the terms of the statutory tenancy which involve an increase of rent. The rent is not automatically increased by the notice, but only by the making of a contract under which the tenant becomes bound to pay the increased rent, and the contract is made by the tenant accepting the terms of the notice and staying on as a statutory tenant after he has been told by the landlord that it is only upon those terms that the landlord offers to retain him as tenant. That notice in normal circumstances is given, and, indeed, as it seems to me, must necessarily be given before the tenancy has in fact been determined. A good instance is to be found in the case of *Ahearn* v. *Bellman* (1) which was referred to in the course

(1) 4 Ex. D. 201.

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of the argument. There the defendant was tenant to the plaintiff from year to year of a shop at the rent of 150*l.* a year and the plaintiff gave the defendant notice in writing to quit on the day terminating the tenancy, in which notice he said: "I hereby further give you notice that should you retain possession of the premises after the date before mentioned the annual rental of the premises now held by you from me will be 160*l.*, payable quarterly, in advance." That is the way in which a landlord ordinarily raises the rent. He gives the tenant notice terminating the tenancy and also gives him notice before the tenancy has determined that if he stays on it will be at an increased rent. To my mind the Act makes a similar provision with this addition that it fixes the length of the notice of increase to be given in every case. Inasmuch as the Act is dealing with small houses which for the most part I suppose are let on weekly tenancies, the Legislature would seem to have thought that it would be sufficient that the notice in respect of the larger increases should be a month's notice. The occupier thus gets a month within which to make up his mind whether or not he can afford to pay and will pay the increased rent, and, if he does not want to pay it, to look for further accommodation. In the case of the smaller increase in respect of rates the length of the notice is only to be a week. That, no doubt, is the principle of the enactment. I see no reason why under this Act a landlord when he is giving his tenant a month's notice to quit may not at the same time give him a notice that if he stays on then at the expiration of a month the rent will be so much more. When the month has expired the notice to quit and therefore the tenancy will have expired also and the period will have commenced when the increased rent can be charged. That being so, it appears to me that this notice of increase is within the provisions of the Act.

A further point was raised—namely, that s. 3, sub-s. 2, requires that the notice of increase is to be in the form contained in the First Schedule to the Act, or in a form substantially to the same effect, and that the notice in question was

not in that form. It is said that the statutory notice states that an increase under head (*b*)—that is the increase on account of rates—will date from such and such a date being one clear week from the date of the notice, and that the remaining increases will date from such and such a date being four clear weeks from the date of the notice. In the particular instance in question the plaintiff gave a notice in respect of both rates and rent which was to date from a day more than twenty-eight days from the date of the notice, and it is said for some reason or other that that invalidates the notice, even though the notice being a longer notice than is required is obviously in favour of the tenant and not of the landlord. It seems to me to be impossible to say that that limitation of time invalidates the notice. The notice is to be in the form contained in the schedule or in a form substantially to the same effect, and as this notice has no legal effect varying in any material respect the statutory notice, it appears to me to be in a form substantially to the same effect as that notice.

I only wish to add that the decision at which we have here arrived will not support the view that the landlord may give the statutory notice to increase rent before he has given the notice to terminate the tenancy. A notice of increase given before the notice to quit would probably be what the county court judge calls a provisional or conditional notice. Though the point does not arise now, I think the idea should not be encouraged that such a notice as that would be valid. In this case as the notice to quit and the notice to increase rent were given at the same time, it is obvious that the latter notice is not open to the objection that it was given before the former.

I agree, therefore, that the appeal should be allowed with costs here and below, and as there seems to be no other defence, I think that judgment should be entered for the plaintiff for the amount claimed.

LORD STERNDALE M.R. I may add that I agree that our judgment must not be taken to authorize the giving of a

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notice to increase the rent before the notice to quit. As the point is not now before us, I will say nothing further about it.

Appeal allowed; judgment for plaintiff.

Solicitor for plaintiff, appellant: *Herbert A. Phillips.*
Solicitors for defendant, respondent: *Baker & Savigny.*

J. R.

END OF VOL. III. AND OF KING'S BENCH SERIES FOR 1921.

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